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In the

Supreme Court of the United States

October Term, 1998

MICHELE PENRY and DEBRA ANN GILLUM,

Petitioners,

-v-

FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals' decision impermissibly defines down sexual harassment under Title VII because of its refusal to make a complete examination of the totality of the circumstances affecting the three female plaintiffs' work environment.

2. Whether actionable sexual harassment should have been found because Federal Home Loan Bank was responsible for creating a hostile environment through the actions of Bank officers threatening the women and not responding to their complaints.

3. Whether the United States Court of Appeals should have found actionable retaliation when Waggoner threatened to fire Petitioners if they continued to complain about harassment.

4. Whether the United States Court of Appeals followed the correct legal standard for intentional infliction of emotional distress in dismissing Penry's claim that when she was pregnant her supervisor, Bank officer Waggoner, screamed at her, offensively touched her and repeatedly followed her to the bathroom and Gillum's claim that Waggoner knew or should have known she had been sexually abused as a child and with that knowledge, Waggoner repeatedly touched her and followed her.

5. Whether the United States Court of Appeals award of costs against the Petitioners impermissibly chills the exercise of their Title VII rights where at least the Untied States Court of Appeals recognized that the United States District Court had applied the wrong test to determine hostile work environment.

PARTIES TO THE PROCEEDINGS

Petitioners

Debra Ann Gillum and Michele Penry.

Respondents

Federal Home Loan Bank of Topeka and Charles R. Waggoner.

Amicus Curiae

Equal Employee Opportunity Commission before the 10th Circuit Court of Appeals in the case of *Gillum v. Federal Home Loan Bank of Topeka*, 155 F. 3RD 1257 (10TH Cir. 1998).

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OPINIONS BELOW

The United States Court of Appeals for the 10th Circuit issued its consolidated published opinion affirming the United States District Court for the District of Kansas upon both Penry and Gillum's cases. *Penry v. Federal Home Loan Bank of Topeka*, 155 F. 3RD 1257 (10TH Cir. 1998). (App. at 1a) The United States Court of Appeals for the Tenth Circuit denied Petitioners' Request for Rehearing En Banc. (App. at 55a) as well as granted appellees' bills of costs over Petitioners' consolidated memorandum objection. (App. at 55a & 56a) The United States District Court for the District of Kansas, ordered entry of the final judgment in *Gillum v. Federal Home Loan Bank of Topeka* on June 17, 1997 and in *Penry v. Federal Home Loan Bank of Topeka* on June 10, 1997. Copies of the memorandum orders are printed in the appendix at pages 14a and 37a respectively. (App. at 14a & 37a)

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on September 15, 1998. (App. at 1a); 155 F. 3RD 1257 (10TH Cir. 1998). On September 29, 1998, Petitioners filed a Petition for Rehearing and for Rehearing En Banc, which the United States Court of Appeals denied on October 16, 1998. (App. at 55a) This Petition for Writ of Certiorari is being filed within 90 days of the denial of the Petition for Rehearing and within 90 days of granting appellees' bills of costs over Petitioners' consolidated memorandum objection. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC § 2000e(1998)
§ 2000e Definitions.....App. at.58a

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Federal Rule of Appellate
Procedure 39.....App. at 60a

STATEMENT OF THE CASE

The fundamental question in these consolidated cases is whether the acknowledged sexual harassment suffered by the two Petitioners and a co-worker rises to the level of a Title VII violation. What makes these cases unique is the way they clearly present the crucial issue of what it means to consider all of the circumstances endured in the workplace by Title VII plaintiffs in determining the threshold for actionable sexual harassment.

Petitioners Debra Ann Gillum, ("Gillum") and Michele Penry, ("Penry"), were employed by the Federal Home Loan Bank, ("the Bank"), as collateral review assistants along with Sherri Bailey, whose case, *Sherri Bailey v. Federal Home Loan Bank, et al.*, Case No. 98-3302, was not consolidated with Gillum and Penry and is currently on appeal to the United States Court of Appeals. The collateral review manager, Charles Waggoner, ("Waggoner"), supervised them on out of town collateral review trips and evaluated them on his return. He later became a Bank Vice-President and the women's full-time supervisor.

Waggoner cultivated a general atmosphere hostile to women.. He demeaned female employees, called them his "gals" instead of using their names, called them stupid, stared at them, grinning and grimacing in a way the women perceived as sexual. Bank Human Resources Director, Cnossen, believed Waggoner had a problem with insensitivity to women but told the women he understood Waggoner's problem because he had disparaged his own wife.

Repeatedly, Waggoner engaged in individually directed

actions against the three women. These are summarized as to Penry and Gillum in the "Chart of Incidents", Footnote 1 To Penry and Gillum's Petition for Rehearing and Suggestions for Rehearing En Banc. (App. at 63a - 78a) this is a partial summary of the incidents factually supported in the Petitioners' summary judgment responses. The Court is respectfully requested to read this chronological excerpt contained in the Appendix at pages 63a through 78a. (App. at 63a - 78a) At the end of this Chart are listed several events that occurred repeatedly and must figure as part of the web of overt as well as insidious harassment that Waggoner indulged in at will.

After the women's repeated complaints were finally taken up by management in the spring of 1993, management endorsed Waggoner's actions by their neglect to take any effective action. The Bank allowed threatening daily contact with the woman by Waggoner as their direct supervisor on site at the Bank. In this atmosphere, Waggoner became more bold, perpetuating the hostile environment he used to drive the women out. This is unequivocally illustrated by Waggoner's statement in front of Gillum, "One down and two to go" after he had successfully caused Sherri Bailey to resign. (App. at 70a) Then, Waggoner intensified the women's hostile work enviornment by threatening to fire Penry and Gillum after their complaints to management about his sexual conduct. (App. at 73a)

ARGUMENT FOR GRANTING WRIT

This Court should grant the Petitioners' writ because the Court of Appeals has established a chilling precedent directly contrary to this court's ruling in *Oncale v. Sundowner Offshore*

Services, Inc., 118 S.Ct. 998 (1998). *Oncale* mandates consideration of the totality of the circumstances experienced by plaintiffs in a sexual harassment case: "....that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Id.* at 1003. The Court of Appeals has not done this and as a result has impermissibly raised a daunting barrier to the enforcement of Title VII.

Under the *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993), standard, courts are bound to look at "all the circumstances" to determine whether a woman's work environment is hostile. Plaintiffs' contend that while the Court of Appeals professed to reject the district court's use of a mechanical counting procedure, it fell into the same trap. The Court of Appeals glossed over important questions which must be addressed if Title VII is to be effectively and uniformly applied. The Court of Appeals limited its consideration of the circumstances endured by plaintiffs to those which it considered gender based and those which it considered ambiguous, but potentially gender motivated or having gender related implications (App. 7a -10a; See grey-lined at App. 63a-78a)

The Court of Appeals first exercise appears to be an application of a kind of "but for" test with each event viewed in strict isolation. This yields a limited number of gender based incidents. The second exercise appears to pay lip service to the concept that general atmosphere not directed at a specific plaintiff should also be considered. But this is also read in isolation.

Here the Court of Appeals adds two events with gender implications. Conspicuously absent is any kind of contextual

analysis of the interlocking web of experience suffered by the plaintiffs. This is directly contrary to *Oncale* which accurately observes, "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 1003. The Court of Appeals gave no rationale for exclusion of the majority of the plaintiffs' evidence except to comment that while the plaintiffs' environment was hostile, it was the result of what the Court of Appeals labeled as gender-neutral antics, poor taste and a lack of professionalism. (App. at 10a - 11a)

Thus, by looking at events mechanically, in isolation and out of context, the Court of Appeals has defined down what legitimately constitutes sexual harassment. As a result, women throughout the country will be faced with an increasingly unsympathetic analysis of their work environment. This approach eviscerates any genuine effort to examine the plaintiffs' work environment as can best be seen by a realistic look at the way plaintiffs could only have perceived their workplace as set forth in Footnote 1 to Petitioners' Petition for Rehearing. (App. at 63a-78a)

This Court should intervene to enforce its ruling in *Oncale* and other relevant precedent, clarify the threshold of sexual harassment, and give guidance to the district courts in applying the contextual analysis mandated by *Oncale*. To refrain from doing so will allow a chilling precedent to hamper the enforcement of Title VII and promote confusion among the courts which will look to the Tenth Circuit decision.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE COURTS BELOW FAILED TO FOLLOW THIS COURT'S CONTROLLING PRECEDENT AND EXAMINE THE SOCIAL CONTEXT, THE CONSTELLATION OF SURROUNDING CIRCUMSTANCES, EXPECTATIONS, AND RELATIONSHIPS OF THE PLAINTIFFS' WORKPLACE.

Both the Court of Appeals and the district court failed to examine the totality of the circumstances which constituted the work environment of Title VII plaintiffs Gillum, Penry and Bailey.

The Court of Appeals did venture to "disagree slightly" with the district court's mechanical counting of gender based incidents. (App. at 7a) In so doing, it pays lip service to the concept that sexual harassment should be evaluated "in the light of the record as a whole" and the "context in which the alleged incidents occurred." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986)(quoting EEOC guidelines, 29 C.F. R. § 1604.11(b) (1985)(internal quotation marks omitted). Previous Tenth Circuit precedent has followed this requirement. *See, e.g., Smith v. Norwest Financial Acceptance, Inc.* 129 F.3d 1408, 1413 (10th cir. 1997).

However, the Court of Appeals jumps to the conclusion that it has examined the record and agrees with the district court that only a few gender based incidents occurred. (App. at 7a)

Then, after citing precedent to the effect that the totality of the circumstances must be considered, it finds "that at least two of the incidents that the district court found not to be gender-based are nevertheless relevant to the plaintiffs' claims of a hostile work environment." (App. at 8a)(emphasis added). The Court of Appeals lists Waggoner's comments, on separate occasions, to Penry and Gillum about a mall roof looking like a woman's breasts and Waggoner taking Gillum to the restaurant Hooters against her will. (App. at 8a - 10a)

The Court of Appeals appears to concur that these additional incidents are not gender based. It concludes that Waggoner might have been as likely to have treated a male assistant in the same way. This, however, is pure speculation as there was no evidence that he treated males the same way. Indeed, the Court of Appeals appears to be stating the fallacious proposition that if anything could speculatively have been said or done to a male as well as a female that it cannot be a basis for title VII liability!

This argument can easily be shown to be false by the simple method of *reductio ad absurdum*. For example, Waggoner could certainly have asked a male if he had wet dreams. Every other comment or action could conceivably been done to a male with the possible exception of Waggoner's statement that Penry allowed him to get in her drawers, the question about what she was wearing under her dress, (what if Penry had been wearing slacks–would that have removed liability because the remark could have been made to a male?), and the comment about the bra strap.

Apparently allowing itself to be cornered by the mall roof breasts comment and the Hooters visit, the Court of

Appeals creates a new category of acts which have "gender-related implications." (App. at 9a) Apparently, the Court of Appeals believes events with "gender related implications" cannot be the basis of liability but can satisfy a court's requirement to look at the totality of the circumstances. Thereafter, the Court of Appeals concludes that no rational jury "could find that plaintiffs' workplace was permeated with discriminatory intimidation." It reaches this conclusion by ignoring all of the other egregious incidents the women suffered in the context of their workplace. (App. at 63a - 78a) While concluding that there was "no doubt that the plaintiffs worked in an unpleasant environment", the Court of Appeals found the gender-based incidents were "too few and far between". (App. at 10a)

This approach constitutes an avoidance of any meaningful consideration of the workplace context. The proof of this error is evident in the Court of Appeal's avoidance of the factual content of the plaintiffs' workplace environment. It is also evident in the Court of Appeal's exclusive reliance on gender-based incidents in isolation from each other and from the Circuit's newly created but logically toothless category of acts with gender implications.

The Court of Appeals gave no apparent consideration of the contextual implications of events such as Waggoner's offensive touching of Gillum, Penry and Bailey, Waggoner telling Gillum when she was stuck in a car alone with him that he had sex with young women about her age, Waggoner's overtly sexual comments at Hooters about "cum" and "sex", asking Bailey to take his hotel room key out of his pants pocket, Waggoner asking a female assistant to look at those "hooters", threatening, shouting and touching Penry when she was

pregnant, threatening to fire the women after they complained about his sexual harassment, commenting after Bailey was constructively discharged that it was "one down and two to go", and repeatedly staring at the women and following the women to the break room or the bathroom. A further backdrop to these multiple incidents is the evidence of Waggoner's demeaning attitude to women. *See,* App. At 63a - 78a.

This Court should grant plaintiffs' petition because the Court of Appeals did not truly consider the context in which these incidents occurred. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986). A genuine examination of context must deal with the total web of interlocking experiences which make up the environment which each of the women experienced in different ways and at different times. This web is the context which made their workplace hostile.

This Court should give guidance in application of the principles set forth in *Oncale*:

> In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.
> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field -- even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a **constellation of surrounding**

> **circumstances, expectations, and relationships** which are not fully captured by a simple recitation of the words used or the physical acts performed. (emphasis added)

Oncale v. Sundowner Offshore Services, Inc.,
118 S.Ct. 998, 1003 (1998).

Neither did the Court of Appeals consider the contextual observations which were strongly implied by the way the plaintiffs perceived their environment. *Harris v. Forklift Systems, Inc.*, 126 L.Ed. 2d. 295, 303 (1993). For example, Gillum was sexually abused as a child and it is a factual question as to whether Waggoner played upon this. Penry was pregnant when much of Waggoner's touching and screaming occurred. 42 U.S.C. § 2000e(k).

Much of Waggoner's behavior at the office was publically humiliating, while some of his more overt sexual comments were made when he had control over the women alone and out of town. An exception to this is Waggoner's public behavior at Hooters.

Neither did the Court of Appeals use its own precedent in *Hirase-Doi v. U.S. West Communications*, 61 F.3d 777 (10th Cir. 1995), which allows consideration of the workplace context through knowledge of the sexual harassment of others. By ignoring this valuable precedent, the Court of Appeals seems to be overruling it by neglect or at least evacuating its force by allowing potential events of sexual harassment to be considered in isolation.

By exclusively looking at events it categorized as gender

based or with gender implications, the Court of Appeals appears to rely on a kind of artificial "but for" test. As a result, it avoids 1) the context of actions against other female collateral assistants, 2) the general atmosphere of hostility toward women in the Bank workplace, 3) Waggoner's violent and threatening actions.

It is, of course, conceivable that if some of Waggoner's actions had not been coupled with more overt sexual acts, touching and sexual comments and if they were viewed in isolation, they would not alone be actionable sexual harassment. However, because his offensive touching, verbal threats, stares, and stalking were indeed coupled with more explicitly sexual behavior, in context they give potent support to the women's hostile environment.

II

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE COURT OF APPEALS' DECISION HAS THE EFFECT OF MAKING MUCH REPETITIVE AND EGREGIOUS SEXUAL HARASSMENT NOT ACTIONABLE BY ESTABLISHING A THRESHOLD FAR BEYOND THAT CONTEMPLATED IN *ONCALE* AND *FARAGHER*

Obviously, not everything that is offensive in the workplace amounts to sexual harassment. This Court has given the guidance that certain kinds of actions such as "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of*

Boca Raton, 118 S.Ct. 2275 (1998) citing *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998). Ordinary tribulations of the workplace are of course not actionable. *Faragher* gives the examples of 1) sporadic use of abusive language, 2) gender-related jokes, and 3) occasional teasing. *Faragher v. City of Boca Raton,* 118 S.Ct. 2275 (1998).

Petitioners respectfully submit that the events they repeatedly experienced as set forth in Petitioners' Appendix 63a through 78a, which is only a partial compilation, go far beyond the non-actionable examples given by this Court in *Faragher.*

The Court of Appeals has not followed this precedent. While appearing to acknowledge that the Petitioners' work environment was hostile, it attributes this to gender-neutral antics, poor taste and lack of professionalism. (App. at 10a - 11a) Thus, the obviously intolerable working environment of these women is defined away from any possible redress.

Petitioners' cases are not simply instances of an extremely hostile but not actionable work environment. First, the facts themselves make out a *prima facie* case well beyond the threshold summarized in *Faragher* and *Oncale.* Second, when seen through a proper contextual analysis as established by this Court's precedent, the discriminatory intent because of the Petitioners' sex is revealed as sufficiently severe and pervasive to alter the conditions of the victims employment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

To allow the Court of Appeals' opinion to stand would be to establish a threshold so far above the guidelines of *Oncale* and *Faragher* that Title VII's remedial purposes would be severely hampered.

III

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FEDERAL HOME LOAN BANK CREATED A HOSTILE WORK ENVIRONMENT THROUGH THE THREATS AND FAILURES TO ACT BY ITS OFFICERS AFTER THE WOMEN COMPLAINED OF WAGGONER'S SEXUAL HARASSMENT.

Penry, Gillum and Bailey repeatedly complained of Waggoner's sexual harassment. When the Bank's Human Resources Director Cnossen finally addressed the matter, Cnossen stared at Penry's breasts, told the women that he had disparaged his own wife so he understood Waggoner, told them sexual harassment was hard to prove, and told them to just ignore Waggoner. (App. at 71a) Additional acts are supported in Petitioners' summary judgment responses which are available for the Court's review if it desires. When Waggoner, a Bank Vice-President, heard of Penry and Gillum's meetings with other officers, he took actions which in themselves constituted sexual harassment. He told them he could act the way he did toward them because the Bank president behaved the same way. (App. at 70a, 71a) He told Gillum and Penry to never again complain outside of the department to anyone other than him. He told them he had fired other women. (App. at 73a). After Bailey resigned, he said in front of Gillum "One down and two to go". He followed Penry to the bathroom and both Penry and Gillum to the breakroom more often. (App. at 70a - 72a) He combed their files looking for errors to get ammunition to fire them. (App. at 75a) He offensively touched both women. He sexually

assaulted Gillum on several occasions. (App. at 72a - 75a) He screamed at Penry and hit her on the shoulders repeatedly when she was pregnant. (App. at 74a)

Certainly these actions are part of the social context and totality of the circumstances which any court should preeminently consider when determining the type of work environment the women experienced.

Previously, Penry, Bailey and Gillum had all wept in the presence of Bank management when the Bank made Waggoner their full time supervisor despite their persistent complaints of his sexual harassment. (App. at 68a) Thereafter, they experienced an every day environment where their renewed complaints were ignored and they repeatedly experienced Waggoner's escalating behavior. The Bank allowed Waggoner free rein to make their lives miserable because they had complained.

Therefore, the women show that their work environment was permeated with hostile intent and discrimination through actions taken and perpetuated by Federal Home Loan Bank management.

Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000-2(a)(1) (App. at 58a, 59a)

Here, the women's complaints resulted in a reaction so

severe and pervasive that the conditions of their employment were altered. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). The record reveals that the Bank's actions through its officers interfered with the women's work performance. Furthermore, Waggoner's actions after the women complained were both threatening and humiliating. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) As in *Faragher*, the Federal Home Loan Bank could not be found to have exercised reasonable care to prevent the supervisor's harassing conduct.

IV

THIS COURT SHOULD GRANT THE PETITION BECAUSE WAGGONER'S THREATS TO FIRE PENRY AND GILLUM AND HIS BOAST AFTER BAILEY RESIGNED THAT IT WAS ONE DOWN AND TWO TO GO ARE ACTIONABLE RETALIATION UNDER TITLE VII AND GILLUM WAS CONSTRUCTIVELY DISCHARGED.

Waggoner harassed and threatened to discharge Gillum and Penry because they rejected his advances and complained about his behavior. The district court and Court of Appeals erred in holding these events do not constitute a materially adverse employment action because the ruling is inconsistent with the language and purpose of the anti-retaliation provision in Title VII.

Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a), makes it unlawful for an "employer to discriminate against any of his employees...because [the employee] has opposed any

practice made an unlawful employment practice by this title. (App. at 59a) This broad language supports a finding that threats in response to protected conduct are actionable retaliation under Title VII. Section 704(a) "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions, such as discharge, transfer, or demotion". *Hashimoto v. Dalton*, 118 F.3d 671, 675 (9th Cir. 1997)(quoting *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331(D.C. Cir. 1991).

Effective enforcement of the provision requires employees to feel free to invoke the complaint mechanisms without fear of reprisal. *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 848 (1997)(goal of § 704(a) is to maintain "unfettered access to statutory remedial mechanisms"). The Tenth Circuit has recognized this in other cases. In *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th cir. 1996) the Tenth Circuit held the employer liable under §7-4(a) for filing criminal charges against a former employee in response to his Title VII race discrimination charge. In *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th cir. 1977) the Tenth Circuit held a former employee may challenge a post-termination retaliatory job reference under § 704(a).

Here, the employer threatened to fire Penry and Gillum if they complained "outside the department". These threats strike at the heart of the enforcement scheme because Penry and Gillum had the untenable choice of risking discharge for exercising their rights to complaint or enduring continued discrimination. *See, Robinson*, 117 S.Ct. at 848 (agreeing that unless former employees are covered, "threat of post-employment retaliation [would] deter victims of discrimination from complaining to EEOC" and, so, undermine Title VII's

effectiveness); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984)("fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions").

A jury could reasonably find that Waggoner's threats to fire Penry and Gillum were not idle. He acknowledged in front of Gillum that he had successfully driven Sherri Bailey out and intended to do the same to Gillum and Penry when he stated too another worker in front of Gillum that "there's one down and two to go". (App. at 70a) When Penry and Gillum failed to heed Waggoner's warnings to stop complaining by informing the Bank about Waggoner's threats and his continuing sexual harassment, Waggoner went through the women's files looking for errors. (App. at 75a) A jury could infer the purpose of the search was to build a basis for discharging the women and reasonably find that Waggoner's threats were plausible and violated § 704(a). The question is not whether the threats actually chilled the women's complaints about discrimination but whether they were plausible and reasonably likely to have such an effect. *See, Hashimoto*, 118 F.3d at 676 (the fact the unlawful action "turned out to be inconsequential goes to the issue of damages, not liability.") *See, also, EEOC v. L.B. Foster Co.*, 123 F.3d 746, 753-54 & n.4 (3rd Cir. 1997)("employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result")

There is a triable issue of fact whether Waggoner's threats satisfy the standard. The Tenth Circuit decision was inappropriate and should be reversed.

V

THIS PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DID NOT FOLLOW THE CORRECT LEGAL STANDARD IN KANSAS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHEN IT DISMISSED PENRY AND GILLUM'S CLAIMS.

The Kansas Supreme Court's threshold for emotional distress of a female employee considers far less severe conduct than that claimed by Gillum and Penry. In *Taiwo v. Vu*, the Supreme Court of Kansas upheld the jury verdict in favor of the plaintiff as a reuslt of dispute over a final paycheck where the female defendant apparently shoved Mrs. Taiwo in the chest, subsequently locked her inside her place of employment, and made false accusations to the police that the plaintiff had vandalized her car. *Taiwo v. Vu*, 822 P.2d 1024 (1991) Taken as a whole, that conduct is far less severe than that suffered by Penry and Gillum.

The courts below failed to consider the special circumstances of Gillum and Penry which made Waggoner's actions intentional. Gillum had been abused as a child and Waggoner asked Penry about this. Penry was pregnant in this spring of 1993 when Waggoner's threats, touching and following increased after the women complained. "To subject an expectant mother to repeated harassment of the type alleged at the workplace may indeed by 'extreme and outrageous' conduct." *Patterson v. Xerox Corp.*, 901 F.Supp. 274 (N.D.Ill. 1995) The Restatement of Torts (Second) uses the example of knowledge of pregnancy to determine liability for emotional distress by the actor who is aware of the pregnancy.

Restatement (Second) of Torts, § 46, emt.f. illus. 11, at 76 (1965).

VI

THIS PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS AWARD OF COSTS AGAINST THE PETITIONERS UNDER FEDERAL RULES OF APPELLATE PROCEDURE 39 CHILLS THE ENFORCEMENT OF TITLE VII RIGHTS PARTICULARLY WHERE PETITIONERS WERE PARTIALLY SUCCESSFUL IN OBTAINING A FINDING FROM THE COURT OF APPEALS THAT THE DISTRICT COURT HAD APPLIED THE WRONG TEST IN CONSIDERING THEIR CLAIMS.

As set forth *supra.*, in Arguments I and II, the Court of Appeals did agree with Gillum and Penry that the district court had incorrectly applied a mechanical counting test to analyze their hostile environment claims. Under Federal Rule of Appellate Procedure 39, the Court of Appeals taxed Gillum and Penry for the costs of the appellees' briefs and appendixes.

Taxing costs against Title VII plaintiffs , particularly when their appeal resulted in some measure of success, is particularly inappropriate and serves to discourage review of important issues such as those presented in the Petitioners' cases.

By analogy, under 42 U.S.C. §1988, district courts rarely award defendants fees or costs unless the plaintiff's claim is shown to be frivolous. *See, e.g., Vukadinovich v. McCarthy,*

59 F.3d 58 (C.A. 7, Ind. 1995)(defendant allowed costs for garnishment proceedings to collect from plaintiff attorney fee award based on frivolousness of civil rights action.) The Tenth Circuit has determined that a district court may exercise its discretion under 42 U.S.C. §1988 to award fees to a prevailing defendant only when the plaintiff's underlying claim is frivolous, unreasonable, or groundless. *Pike v. City of Mission, Kan.*, 731 F.2d 655 (10th Cir. 1984).

There is further good cause that the Court of Appeals should not have assessed appellees' costs to the Petitioners. Much of the appellees' briefs and record were devoted to attempting to discredit the appellants' statement of the record of facts on appeal. The Court of Appeals did not point out any fault on the part of the Petitioners regarding their presentation of the facts on the appeal record. Petitioners not only presented a proper and sufficient record in their appeal briefs but also successfully countered the appellees' attempt to discredit the Petitioner's presentation of facts by providing the Court of Appeals with proper cites in their reply brief.

In addition, Federal Home Loan Bank is a large business for which the costs of the briefs and record is comparatively small. In contrast, the Petitioners are individuals for whom the costs of the appellees' briefs would constitute a large monetary burden. Penry, who still works for Federal Home Loan Bank, is a single mother with a small child. Gillum has still not been able to work because of the results of the actions she complained of at the Federal Home Loan Bank.

CONCLUSION

If this Court does not immediately intervene it will give tacit approval to a chilling precedent established by the Court of Appeals. This precedent obliterates the well established need for courts to consider the totality of the circumstances and the context of workplace actions violating Title VII. The decisions of the district court and the Court of Appeals are contrary to the rule of *Oncale* and *Faragher*. They insidiously sidestep any realistic examination of the Petitioners' workplace circumstances and context. As Aristotle said, in order to reach the right answers you have to ask the right preliminary questions. If the kind and extent of the incidents contained in the Appendix 63a through 78a are not actionable, then Title VII has suffered a severe defeat which will resonate through the workplace in America. This decision must not be allowed to stand.

This Court should intervene to enforce its ruling in *Oncale* and other relevant precedent, clarify the threshold of sexual harassment, and give guidance to the district court in applying the contextual analysis mandated by *Oncale*.

Respectfully submitted,

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(Any footnotes trail opinion)

No. 97-3203, No. 97-3204

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHELE PENRY, Plaintiff - Appellant, v. FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity, Defendants - Appellees. DEBRA ANN GILLUM, Plaintiff - Appellant, v. FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity, Defendants - Appellees. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae.

September 15, 1998, Filed

COUNSEL: Michael B. Myers (Cheryl D. Myers, with him on the briefs), Myers & Myers, Topeka, Kansas, appearing for Plaintiffs-Appellants.

Patricia E. Riley (Denise M. Howard, with her on the briefs), Weathers & Riley, Topeka, Kansas, appearing for Defendants-Appellees.

Barbara L. Sloan, Attorney (C. Gregory Stewart, General Counsel, J. Ray Terry, Jr., Deputy General Counsel, Vincent J. Blackwood, Acting Associate General Counsel, and Carolyn L. Wheeler, Assistant General Counsel, with her on the brief), Equal Employment Opportunity Commission,

Washington, DC, appearing for amicus curiae Equal Employment Opportunity Commission.

JUDGES: Before PORFILIO, McKAY, and TACHA, Circuit Judges.

OPINIONBY: TACHA

TACHA, Circuit Judge.

Plaintiffs Michele Penry and Debra Ann Gillum sued their employer, Federal Home Loan Bank of Topeka (FHLB), for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964 and for intentional infliction of emotional distress under Kansas state law. Gillum, who resigned prior to suing the bank, also claimed constructive discharge. The district court granted the defendants' motions for summary judgment on all claims. Penry and Gillum appeal the grants of summary judgment, and we exercise jurisdiction over their consolidated appeals under 28 U.S.C. § 1291. We affirm the entry of summary judgment on all claims.

BACKGROUND

Both Penry and Gillum base their complaints of sexual harassment on the actions of Charles Waggoner, another FHLB employee and, for most of the relevant time period, their supervisor at the bank. Both of the plaintiffs began working at FHLB in 1989 and held the position of collateral review assistant at all relevant times. In 1989, FHLB hired Waggoner as the collateral review manager. The duties of the collateral assistants included accompanying Waggoner on out-of-town trips to borrowing financial institutions to conduct on-site inspections of collateral. Prior to November 1992, Waggoner was not the plaintiffs' immediate supervisor at FHLB, but he

did have supervisory authority over the collateral assistants during the out-of-town inspection trips. In November 1992, he became their direct supervisor.

OPINION: Both plaintiffs describe a variety of inappropriate comments and behavior by Waggoner between 1990 and 1993. Gillum asserts that several times when she and Waggoner traveled together for FHLB business, he intentionally gave hotel clerks the impression that he and Gillum were to share a room, leaving it to Gillum to correct the situation. While Penry was on business travel with Waggoner in March 1990, he asked her if women have wet dreams. While Waggoner and Gillum were on a business trip together in April 1990, Waggoner took Gillum to dine at Hooters, a restaurant whose marketing theme is based on its well-endowed female waiting staff. Gillum was unaware of this feature of the restaurant until after they arrived. Later, Penry and Gillum learned from another woman in their department that Waggoner had also chosen that restaurant while on business travel with her. On another trip, Waggoner insisted that Gillum work in his hotel room despite her protests and request to work in her own room.

During a business trip in October of 1990, Waggoner told Penry that her bra strap was showing but then said, according to Penry, that he kind of liked it that way. In March of 1991, Gillum overheard Waggoner make a double entendre to another male employee that one of the female assistants "allowed him to get in her drawers anytime." In November 1992, Waggoner asked Penry what she was wearing under her dress and laughed when she said she did not appreciate the comment. On separate occasions in 1990 and 1991, Waggoner pointed out to each of the plaintiffs that the roof of a particular mall was shaped like a woman's breasts. Penry alleges that in the fall of 1992, Waggoner began following her

constantly when she got up to go to the breakroom or the bathroom. Gillum alleges that between spring of 1991 and spring 1992, Waggoner would often (at least twice a week) stand and stare at her while she was working. In December 1992, Waggoner called one of the other female review assistants over to where he and Penry and Gillum were gathered by demanding, "bring your buns over here." Gillum alleges that on one day in 1993, Waggoner leaned against her and repeatedly tried to look down her blouse. Waggoner repeatedly referred to the collateral assistants as "gals" rather than by name when introducing them to employees at other banks on travel, despite their requests that he stop doing so. Both plaintiffs allege that Waggoner needlessly touched them on many occasions throughout the years they worked with him. Each complains that he would often sneak up from behind and grab her shoulders while loudly saying her name to startle her.

Penry and Gillum each informed Waggoner on several occasions that they did not like his behavior and asked him to stop. Both plaintiffs also complained to their supervisors about Waggoner's conduct, including Sonia Betsworth and human resources manager Michael Cnossen.

After another woman working under Waggoner resigned in February 1993, Gillum overheard him say, "One down, two to go," which she understood to mean Waggoner was trying to get rid of her and Penry. Gillum finally resigned in June 1993. Penry remained at the bank, but began working at a different department in March 1994. FHLB terminated Waggoner in November 1994.

DISCUSSION

We review a grant of summary judgment de novo, applying the same legal standard used by the district court. See Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir. 1995) (further citations omitted). The entry of summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party is entitled to summary judgment "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). When applying this standard, the court must examine the factual record and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996).

I. Title VII Sexual Harassment Claim

Title VII makes it unlawful for an employer to discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment on account of her sex. See 42 U.S.C. § 2000e-2(a)(1). The plaintiffs base their Title VII sexual harassment claims on a hostile work environment theory.

For a hostile environment claim to survive a summary judgment motion, "a plaintiff must show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Davis v. U.S. Postal Service, 142 F.3d 1334, 1341 (10th Cir.

1998) (internal quotation marks and citations omitted). The plaintiff must produce evidence that she was the object of harassment because of her gender. Conduct that is overtly sexual may be presumed to be because of the victim's gender; however, actionable conduct is not limited to behavior motivated by sexual desire. See Oncale v. Sundowner Offshore Services, Inc., 140 L. Ed. 2d 201, 118 S. Ct. 998, 1002 (1998); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987). While the plaintiff must make a showing that the environment was both objectively and subjectively hostile, she need not demonstrate psychological harm, nor is she required to show that her work suffered as a result of the harassment. See Davis, 142 F.3d at 1341.

The district court found that of all the allegations made by the plaintiffs, only a few were due to gender. In Gillum's case, the court concluded that Waggoner had made one gender-based comment (regarding getting into an assistant's "drawers") and engaged in four specific acts of unwanted physical contact, all of which were because of her gender, in addition to other touching that occurred periodically. See Gillum v. Federal Home Loan Bank, 970 F. Supp. 843, 852 (D. Kan. 1997). In Penry's case, the court found only that Waggoner had made four gender-based comments (the comments on wet dreams, Penry's exposed bra strap, the "drawers" comment, and asking Penry what she was wearing under her dress), and that none of his conduct toward Penry constituted sexually offensive touching. See Penry v. Federal Home Loan Bank, 970 F. Supp. 833, 840 (D. Kan. 1997). In each case, having narrowed down the relevant acts to a few incidents, the court found that the conduct was not severe or pervasive enough to create an environment that a reasonable juror could find hostile and abusive. Gillum, 970 F. Supp. at 852; Penry, 970 F. Supp. at 840.

We agree with the district court on the number of gender-based incidents that occurred in these cases, and we do not find that other gender-based incidents occurred. We do disagree slightly, however, with the district court's analysis of the evidence, though not with its ultimate conclusion. The court determined that most of the incidents alleged did not occur because of the plaintiffs' gender and were therefore irrelevant to their claims. In reviewing the record, the district court mechanically proceeded through the evidence, determining that certain of Waggoner's conduct was gender-based (and therefore relevant to the plaintiffs' claims), while determining that the other conduct was not gender-based (and was therefore irrelevant to the plaintiffs' claims). Our precedents, however, eschew such a mechanical approach to analyzing hostile work environment claims. In Meritor Savings Bank v. Vinson, the Supreme Court stated that the existence of sexual harassment must be determined "in light of the record as a whole," and the trier of fact must examine the totality of the circumstances, including "the context in which the alleged incidents occurred." Meritor, 477 U.S. 57, 69, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) (quoting EEOC guidelines, 29 C.F.R. § 1604.11(b) (1985)) (internal quotation marks omitted). With this in mind, our hostile environment cases consistently have emphasized the need for the district court to examine the totality of the circumstances when reviewing a summary judgment motion. See, e.g., Davis, 142 F.3d at 1341; Smith v. Northwest Financial Acceptance, Inc., 129 F.3d 1408, 1413 (10th Cir. 1997). Indeed, the very term "environment" indicates that allegedly discriminatory incidents should not be examined in isolation. "One of the critical inquiries in a hostile environment claim must be the environment. Evidence of a general work atmosphere therefore--as well as evidence of specific hostility directed toward the plaintiff--is an important factor in evaluating the claim." Hicks, 833 F.2d at 1415.

The Third Circuit has aptly described the need to examine the totality of the circumstances in hostile environment cases:

> A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario. As the Court of Appeals for the Eleventh Circuit noted, the factfinder in this type of case should not "necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."

Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3rd Cir. 1990) (quoting Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989)).

In light of the record as a whole, we find that at least two of the incidents that the district court found not to be gender-based are nevertheless relevant to the plaintiffs' claims of a hostile work environment. First, Waggoner made comments to both Gillum and Penry about the mall roof looking like a woman's breasts. The district court said of these comments:

> The court is not convinced that Waggoner would not have made these remarks but for [plaintiff's] gender. To the contrary, it seems likely . . . that he would have made the same remark to any associate . . . . Again, while such conduct in a business environment might demonstrate a certain degree of baseness, it

> does not demonstrate sexual animus or gender bias, and [plaintiff] presents no evidence to the contrary.

Gillum, 970 F. Supp. at 850, Penry, 970 F. Supp. at 839-40. Second, the district court observed that Waggoner had taken Gillum to Hooters while on business travel, and similar to its treatment of the mall roof comments, the district court discounted the Hooters incident as relevant.

The defendants assert that we should not consider either of these pieces of evidence since Waggoner may have been as likely to engage in such conduct in the presence of men, and therefore his conduct was not because of sex. While this may be true, we do not think that the evidence is irrelevant and beyond consideration. See Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1320, 1327 (8th Cir. 1994) (finding that evidence relating to a performance by a female stripper at a sales meeting, a videotape showing female sales representatives baring their breasts to their male colleagues, and parties held after sales canvasses to which men brought dates referred to as "road whores" in place of their wives, was relevant to plaintiff's hostile environment claim). It is true that Waggoner might have been just as likely to take a male assistant to Hooters, or that he may have been equally inclined to comment about the shape of the mall roof to a male colleague. In that sense, those incidents were not "because of the plaintiff's gender" and could not be the basis for liability. Nonetheless, these acts have gender-related implications; we cannot, with straight faces, say that Waggoner's trips to Hooters had nothing to do with gender. Indeed, the restaurant's name aims to attract business with a double entendre implicating the female anatomy. Cf. Ray v. Tandem Computers, Inc., 63 F.3d 429 (5th Cir. 1995) (noting that evidence of a lunch meeting at Hooters, "a restaurant/bar known

more for the attire of its service personnel than its cuisine," id. at 432, "may be relevant to a supervisor's motives in employment actions," id. at 434). Nor can we say that Waggoner's mall roof comments had nothing to do with gender. Even where the motive behind the alleged conduct was not the plaintiff's gender, the court may still consider that conduct relevant when evaluating whether ambiguous conduct was in fact gender-motivated or whether gender- motivated conduct was so severe and pervasive as to create Title VII liability.

Accordingly, we turn to the evidence. As noted above, we agree with the district court's assessment of which incidents were gender-motivated and which incidents were not. Even after examining that evidence in light of the Hooters incident and mall roof comments, however, we are still unable to conclude that a rational jury could find that plaintiffs' workplace was permeated with discriminatory intimidation. We have no doubt that the plaintiffs worked in an unpleasant environment. Nevertheless, the gender-based incidents were too few and far between to be considered "sufficiently severe or pervasive to alter the conditions of the victims' employment and create an abusive working environment." Id. (citations and internal quotation marks omitted). The gender-based incidents were spread out over a period of more than three years and are insufficient to establish a discriminatorily hostile environment. Cf. Hicks, 833 F.2d at 1412 (stating that plaintiffs must prove more than a few isolated incidents of racial enmity in hostile work environment case).

The vast majority of Waggoner's behavior set forth in the plaintiffs' 200-paragraph statement of facts seems motivated by poor taste and a lack of professionalism rather than by the plaintiffs' gender. What made the plaintiffs' environment hostile, if anything, was not the gender-based incidents but

instead the gender-neutral antics perpetrated by Waggoner throughout his four-year career at FHLB. "If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment." Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994). We affirm the grant of summary judgment for the defendants on the plaintiffs' hostile environment claims.

II. Retaliation Claims

Penry and Gillum next contend that the defendants retaliated against them when they complained to Waggoner and to their supervisors about Waggoner's harassment. Title VII prohibits an employer from discriminating against an employee in retaliation for opposing unlawful employment practices. See 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation under Title VII, the plaintiff must show that "(1) she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a causal connection between the protected activity and the adverse employment action." Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1381 (10th Cir. 1994).

After a thorough review of the record, we agree with the district court that the plaintiffs have not provided sufficient evidence to establish a prima facie case of retaliation. The record fails to demonstrate that either of the plaintiffs suffered adverse employment action in connection with their complaints regarding Waggoner or their lawsuits. There are no genuine issues of material fact on this issue. Thus, we affirm the grant of summary judgment for the defendants on the Title VII retaliation claims.

III. Emotional Distress Claims

Both Penry and Gillum assert claims of intentional infliction of emotional distress against the defendants. Under Kansas law, liability for emotional distress has two threshold requirements. To resolve a motion for summary judgment on an emotional distress claim, the court must determine:

> (1) Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and
>
> (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it.

Lindemuth v. Goodyear Tire & Rubber Co., 19 Kan. App. 2d 95, 864 P.2d 744, 749 (Kan. 1993) (quoting Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175, 1179 (Kan. 1981)). Conduct is not extreme and outrageous unless it is regarded as being "beyond the bounds of decency and utterly intolerable in a civilized society." Moore v. State Bank, 240 Kan. 382, 729 P.2d 1205, 1211 (Kan. 1986). We agree with the district court that the plaintiffs have failed to demonstrate that either Waggoner's or FHLB's conduct may reasonably be regarded as extreme and outrageous as required by Kansas law. We affirm the district court's entry of summary judgment for the defendants on the emotional distress claims.

IV. Gillum's Constructive Discharge Claim

In addition to the claims discussed above, Gillum (who resigned from FHLB in 1993) claimed that she was constructively discharged. To support a Title VII claim of constructive discharge, the plaintiff "must produce evidence that the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." Thomas v. Denny's, Inc., 111 F.3d 1506, 1514 (10th Cir.) (citations and internal quotation marks omitted), cert. denied, 139 L. Ed. 2d 607, 118 S. Ct. 626 (1997). Even viewing Gillum's allegations in the light most favorable to her, we find that she has not met this threshold, and we affirm the district court's grant of summary judgment for the defendants on this claim.

CONCLUSION

For the reasons set forth above, we AFFIRM the entry of summary judgment for the defendants on the plaintiffs' Title VII hostile environment and retaliation claims, their state law claims of emotional distress, and Gillum's claim of constructive discharge.

Defendants' motion to supplement the record on appeal is denied.

CIVIL ACTION Case No. 94-4197-DES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DEBRA ANN GILLUM, Plaintiff, v. FEDERAL HOME LOAN BANK OF TOPEKA and its representatives; and CHARLES R. WAGGONER as defendants' representative and individually, Defendants.

June 17, 1997, Decided
June 17, 1997, FILED; June 17, 1997, ENTERED ON THE DOCKET

COUNSEL: For DEBRA ANN GILLUM, plaintiff: Cheryl D. Myers, Michael B. Myers, Myers & Myers, Topeka, KS.

For FEDERAL HOME LOAN BANK, of Topeka and its representatives, CHARLES R WAGGONER, in his capacity as defendants' representative and in his individual capacity, defendants: Patricia E. Riley, Weathers & Riley, Topeka, KS. Wesley A. Weathers, Weathers & Riley, Topeka, KS.

JUDGES: DALE E. SAFFELS, United States District Judge

OPINIONBY: DALE E. SAFFELS

OPINION: MEMORANDUM AND ORDER

This matter is before the court on defendants' Motion for Summary Judgment (Doc. 26). Plaintiff has filed a Memorandum in Opposition to defendants' Motion (Doc. 29). Defendants have filed a Reply (Doc. 46). This case arises out of

plaintiff's claim of hostile work environment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, constructive discharge, and intentional infliction of emotional distress. For the reasons set forth below, defendants' motion is granted.

I. FACTS

The following facts are either uncontroverted or, if controverted, construed in a light most favorable to the plaintiff as the non-moving party. Immaterial facts and factual averments not properly supported by the record are omitted.

Federal Home Loan Bank of Topeka ("FHLB") employed Debra Gillum ("Gillum") as a clerk in its collateral department from June 1989 to June 1993, first under the supervision of Sonia Betsworth ("Betsworth") and then, beginning in November of 1992, under the supervision of Charles Waggoner ("Waggoner"). In June 1993, Gillum resigned from her position at FHLB.

FHLB hired Waggoner in November of 1989 as the collateral review manager. As part of his duties, Waggoner conducted on-site inspections of collateral at the borrowing financial institutions. The collateral assistants, including Gillum, Michele Penry ("Penry"), and Sherri Bailey ("Bailey"), and the collateral review assistant, Sally Zeigler ("Zeigler"), took turns accompanying Waggoner on these inspection trips. As the collateral review manager, Waggoner supervised only the collateral review assistant, Zeigler. He did not supervise any of the collateral assistants until he was named collateral officer in November 1992. On trips, however, Waggoner was clearly in charge and was responsible for evaluating the collateral assistants that accompanied him.

During the time Waggoner worked with Gillum, first as co-worker and then as her supervisor, he engaged in conduct which Gillum claims created a hostile work environment within the meaning of Title VII. Gillum presents evidence of numerous instances of Waggoner's alleged misconduct. These and other relevant material facts are set forth in more detail throughout the court's discussion.

II. SUMMARY JUDGMENT STANDARD

A court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1985). The substantive law identifies which facts are material. Id. at 248. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. Id. "Only disputes over facts that might properly affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

The movant has the initial burden of showing the absence of a genuine issue of material fact. Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir. 1993). The movant may discharge its burden "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1985). The movant need not negate the nonmovant's claim. Id. at 323.

Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1985). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324 (interpreting Fed. R. Civ. P. 56(e)). Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. Id. at 322. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. Id. 477 U.S. at 323.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. See, e.g., United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986) (stating that "the court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues"). The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. Anderson, 477 U.S. at 249. Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. Id. at 250.

III. DISCUSSION

A. Sexual Harassment--Hostile Work Environment

Title VII prohibits sexual harassment in the workplace. Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). Sexual harassment under Title VII may be shown under either of two principal theories: quid pro quo discrimination or hostile work environment. Id. at 65-66. Plaintiff has made no quid pro quo claim that sexual favors were coerced in exchange for employment benefits. See Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). Rather, she charges that discrimination based on sex created a hostile or abusive work environment.

A hostile work environment exists when a plaintiff is subjected to sexual harassment "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'" Meritor, 477 U.S. at 67 (citation omitted). Sexual harassment is behavior "'that would not occur but for the sex of the employee' . . . . 'If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination.'" Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995) (citations omitted).

In Harris v. Forklift Sys., Inc., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993), the Supreme Court stated:

Conduct that is not severe or pervasive enough to create an objectively hostile environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

This court, therefore, must determine whether a reasonable jury, considering the admissible evidence as presented by

plaintiff in opposition to defendants' motion for summary judgment, could find that the alleged conduct was: 1) gender based or stemmed from sexual animus; and 2) pervasive or severe enough to objectively alter the terms, conditions or privilege of employment. Gross, 53 F.3d at 1539 (citations omitted). This determination must be made "in light of 'the record as a whole' and 'the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" Id. at 1537 (quoting Meritor, 477 U.S. at 69).

In opposition to defendants' summary judgment motion, Gillum presents evidence, in the form of deposition testimony, of numerous instances of Waggoner's conduct which she contends establishes the existence of a hostile work environment. The court will first examine each of these situations for the purpose of determining whether they were gender based or stemmed from sexual animus. The court will then determine whether Waggoner's conduct was pervasive or severe enough to alter the terms, conditions or privilege of employment.

Gillum presents evidence showing that Waggoner criticized the quality and quantity of her work. For example, on one occasion Waggoner complained to Gillum's supervisor about alleged errors in her work. On another occasion he complained that she spent too much time making personal telephone calls. He also told others that he could not trust Gillum to do her work. The Tenth Circuit has held that criticism of an employee's work, without some type of gender-specific reference, is not gender-based conduct. Gross, 53 F.3d at 1545-46. Gillum presents no evidence that Waggoner's criticism contained any gender-specific references. Accordingly, a reasonable juror could not properly find that Waggoner's criticism of Gillum's work was gender-based.

Gillum alleges that it was sexual harassment for Waggoner to make policies that either contradicted his former policies or contradicted bank policies. However, like her contention that Waggoner's criticism was sexual harassment, she offers no evidence that Waggoner developed these policies because of her gender. Waggoner's decisions may have been misguided, but absent evidence to the contrary, poor management decisions cannot be characterized as gender-based. See Ballou v. University of Kansas Medical Ctr., 871 F. Supp. 1384 (D. Kan. 1994).

Gillum also presents evidence showing that Waggoner, after becoming her supervisor, forced her to tell him when she went on breaks, followed her to the door of the restroom, and required her to account for her time on detailed forms. Gillum contends that this conduct would not have occurred but for her gender. She argues that "Waggoner's obvious fascination with woman's daily routine . . . is inherently sexual in nature." Gillum presents no evidence, however, other than speculation, that these activities were motivated by sexual animus or gender bias. Indeed, Gillum's coworker, Michele Penry, states in her deposition that the true motivation for this conduct was retaliation for their complaints to Betsworth. As such, this conduct, though offensive, cannot be construed as being motivated by sexual animus or gender bias. Likewise, Gillum's other allegations of retaliation by Waggoner, such as his remark after Bailey's resignation that there was "one down and two to go," and his April 27, 1993, meeting with Gillum and Penry to "clear the air," cannot be characterized as motivated by sexual animus or bias.

Gillum cites evidence showing that Waggoner played pranks on her. According to Gillum, Waggoner would sneak up behind her, place his hands on her shoulders and loudly say her name to scare her. In her response, Gillum states that she

does not characterize these acts as "sexual acts per se," but argues they nevertheless constitute sexual harassment because "they illustrate Waggoner's male dominance over female employees in captive situations." The court disagrees. Gillum presents no evidence, other than speculation, that these activities were motivated by sexual animus or gender bias. Gillum also fails to provide legal support for her "male dominance" theory, and the court is not persuaded to construe what appears to be gender-neutral buffoonery as a demonstration of "male dominance" over "captive" female employees. The fact that Gillum may have been "isolated and alone" in her work cubicle or "captive" in Waggoner's car does not convert gender-neutral pranks or mere offensive behavior into conduct motivated by sexual animus or gender bias.

Gillum next opposes defendants' summary judgment motion by offering evidence of Waggoner's offensive comments and outbursts. Gillum complains that Waggoner often yelled at Betsworth for her errors, that he demeaned Betsworth behind her back, and said that all women in the safekeeping department were "dumb" and that his wife was "ignorant." Gillum also complains about Waggoner's use of the term "gals" to refer to the women in his department. Betsworth testified that Waggoner yelled at her and she yelled at him, but she never felt he was abusive to her. While such antics may contribute to an offensive or even "hostile" environment, there is no evidence that this hostility derived from some gender-based animosity or bias. The Tenth Circuit has held that criticism of an employee's work, without some type of gender-specific reference, is not gender-based conduct. Gross, 53 F.3d at 1545-46. Additionally, "dumb" is a gender neutral term since it can apply equally to both sexes. Id. at 1543; Young v. Finish Line, Inc., 1995 U.S. Dist. LEXIS 11567, 1995 WL 472783 at *5 (D. Kan.). This reasoning also applies to Waggoner's use of the term "ignorant." Significantly, Michele

Penry stated in her deposition that Waggoner's use of the term "dumb" to refer to the women in the safekeeping department was not due to sexual animus, but was an example of his general tendency of excusing his own mistakes by shifting blame to other parties. Finally, Gillum presents no evidence that Waggoner's use of the term "gals" stemmed from sexual animus. According to Waggoner, he used the term out of habit, not out of sexual animus. Moreover, it appears that it was not the term itself that offended Gillum, but that it was used by Waggoner. Gillum stated that she was not offended when her prior female supervisor referred to her and other collateral department employees as "her girls."

Gillum also complains about Waggoner's angry behavior directed toward Michele Penry. In April 1993, Penry and Waggoner disagreed over an irregular transaction in the file of a member bank for which she was responsible. When Penry kept insisting that the irregularity was not a mistake, Waggoner, while seated at his desk, shouted to "just sit down and shut up a minute." Penry, afraid that he would "come up out of the chair," exited his office and he followed her shouting" Michele, you're insubordinate. I don't have to take this off of you." Although Waggoner's outburst may have been rude and unprofessional, Gillum has made no showing that this outburst would not have occurred but for her gender. Gillum presents no evidence that Waggoner physically threatened either woman other than Penry's statement that she believed "he might come up out of the chair" and that he had a "glazed look in his eye like he was crazy." There is evidence, however, that Waggoner's hostility was motivated by his belief that Penry was not properly doing her job. As such, "Title VII . . . does not give a woman immunity from being reprimanded in the presence of her co-workers if her supervisor believes that she has violated work rules or has been negligent in performing her job." Gross, 53 F.3d at 1545-46.

Gillum next complains that on an out-of-town trip, Waggoner, while at dinner with Gillum, ordered mixed drinks called "sex on the beach" and "'cum' in a hot tub." Gillum presents no evidence that Waggoner made any sexual overtures toward her or any sexual comments other than to order the drink. As such, merely ordering a drink with a vulgar name, while crude behavior in a business setting, does not demonstrate sexual animus or gender bias. Waggoner's November 1991 reference to the Crossroads Mall in Nebraska as looking like "two hooters" or as the "bra bazaar" or the "boobs up" mall is similarly crude and impolite. Nevertheless, the court is not convinced that Waggoner would not have made these remarks but for Gillum's gender. To the contrary, it seems likely, in light of Gillum's testimony regarding Waggoner's conduct, that he would have made the same remark to any associate, male or female, he may have been traveling with at the time. Again, while such conduct in a business environment might demonstrate a certain degree of baseness, it does not demonstrate sexual animus or gender bias, and Gillum presents no evidence to the contrary.

Gillum argues that Waggoner's reckless driving, his comment to Gillum that she already looked "dressed down" for "dress down" day, and his pointing an oil-can at Sonia Betsworth when posing for a Halloween party picture while dressed as a character from the Wizard of Oz, resulted from gender bias or sexual animus. She also argues that Waggoner's remark that his wife was stupid, his demand that Gillum complete her work in his hotel room, and his insistence that he and Gillum dine at a "Hooters" restaurant while out of town were gender-based. The court finds no evidence, however, from which a reasonable fact-finder could properly accept these arguments. While Wagoner's conduct in some of these situations may have been less than professional, it does not,

standing alone, demonstrate gender bias or sexual animus. Likewise, Waggoner's comment about sleeping with a woman of Gillum's age while on a camping trip may have been rather crude, but Gillum offers no evidence that Waggoner inquired into her sex life or made any sexual overtures to her. Without evidence that Wagoner made this comment because of Gillum's gender, Waggoner's conduct does not demonstrate gender bias or sexual animus.

Gillum also contends that Waggoner's advice to her that she walk to lose weight off her hips and his yelling to Gillum's coworker, Sherri Bailey, to "get your buns over here" are inherently gender-based. The court disagrees. In Gross, the Tenth Circuit held that telling a co-worker to "get [her] ass back in the truck" did not demonstrate gender discrimination because "ass" refers to a portion of human anatomy shared by both sexes. The same rationale applies to Waggoner's use of the terms "hips" and "buns." Gillum's argument that the Gross court's holding is limited to the construction site context is unpersuasive. Once again, Waggoner's conduct may have been crude and offensive, but Gillum presents no evidence to support a finding that it resulted from gender bias or sexual animus.

Gillum next complains about three occasions where she arrived with Waggoner at their hotel to find that only one room had been reserved. According to Gillum, on these occasions she would have to ask the hotel clerk for a separate room. This made Gillum "extremely scared" because when she requested separate rooms, Waggoner "said nothing as if waiting for her response as to whether she was going to stay with him." Gillum contends that Waggoner intentionally orchestrated these oversights because he enjoyed watching her ask for another hotel room and that these incidents were gender-based conduct designed to humiliate and degrade her. Such

conduct, if it were in fact intentional, might arguably be considered gender based. However, Gillum presents no evidence to support her claim that Waggoner intended to cause the hotel room mix-ups. To the contrary, Gillum states in her deposition that she did not know what led the hotel clerks to believe she and Waggoner did not have separate rooms. She also stated that she did not know who made the room reservations, and she offers no evidence to show that Waggoner was responsible. In fact, based on defendant's deposition evidence, it appears that Sally Zeigler, the collateral review assistant, was responsible for the hotel reservations.

Gillum complains that in March 1991, she overheard Waggoner remark to a male co-worker that he had permission to get into the drawers of another female worker, possibly Michele Penry. Defendants contend that even if Waggoner had intended a sexual meaning, there is no evidence to suggest that he made this comment because of Gillum's gender because he was not aware she could overhear him. Gillum argues that Waggoner's comment was actually directed at her because he knew or should have known he could easily be overheard because of the proximity of her work station. As to this comment, the court believes a reasonable jury could find that it was gender based or resulted from sexual animus.

Gillum further complains that every time she was alone with Waggoner, he would touch her arm or hands with his arms. She offers no evidence, however, other than her inference of Waggoner's intent, to show these contacts were anything more than inadvertent. Nevertheless, for purposes of this summary judgment motion, this "arm touching" will be construed as being motivated by gender bias or sexual animus.

Finally, Gillum claims the evidence shows four incidents of unwanted physical contact by Waggoner, all of which she

contends resulted from sexual animus or gender bias. The first incident occurred in January 1991. Gillum states that while she and Waggoner were working together she asked him a question about a document and that when he came over to view it he leaned against her. The second incident, which occurred in December 1992, is similar to the first. Gillum states that Waggoner was looking over her shoulder while she was working and that she felt some part of his body touch her shoulder. She also claims that she knew Waggoner was sexually aroused because she could hear his breathing. The third incident occurred in March 1993 when Waggoner came into a file room and brushed against Gillum as he passed behind her. Lastly, Gillum complains of a May 1993 incident in which Waggoner squeezed himself between her and her computer so that he was able to look into her shirt and that she felt his pelvis touch her shoulder.

The court notes that Gillum presents little or no evidence supporting her claim that these incidents demonstrate something more than inadvertent or incidental touching. However, for purposes of this summary judgment motion, they will be construed as resulting from gender bias or sexual animus. Likewise, the court will assume, notwithstanding some evidence to the contrary, that Gillum subjectively perceived each of these incidents as sexually motivated at the time they occurred.

The next question is whether Waggoner's conduct was pervasive or severe enough to objectively alter the terms, conditions or privilege of Gillum's employment. The Supreme Court said this standard is the middle ground between one that makes merely offensive conduct actionable and a standard that requires a psychological injury. Harris, 510 U.S. at 22. A "mere utterance of an . . . epithet which engenders offensive feelings in an employee," Meritor, 477 U.S. at 67,

"does not impact a condition of employment and, therefore, does not implicate Title VII." Harris, 510 U.S. at 21. On the other hand, Title VII becomes an issue before the employee suffers a nervous breakdown. Id. at 22. Circumstances to consider in each case include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Id. Only that conduct which the court has found to be discriminatory, i.e., resulting from gender bias or sexual animus, will be considered at this stage of the inquiry. See Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994) ("General harassment if not racial or sexual is not actionable.").

The evidence suggests that Waggoner made one gender based comment and engaged in four specific acts of unwanted physical contact between January 1991 and May 1993, all of which are deemed to have stemmed from gender bias or sexual animus. Also during this time, Waggoner periodically touched Gillum on her arms or hands with his arms in a manner characterized by plaintiff as "slow and meaningful." The court is not convinced, however, that a reasonable jury, considering all of the circumstances of this case, could find Waggoner's conduct to have created an objectively hostile work environment that altered the conditions of plaintiff's employment. None of Waggoner's conduct was physically threatening and Gillum does not allege any unwelcome sexual advances. Nor does Gillum allege that Waggoner engaged in any sexually suggestive touching or groping. "Actual physical contact . . . . is not a touchstone triggering the applicability of Title VII." McCrackin v. LabOne, Inc., 903 F. Supp. 1430 (D. Kan. 1995). See Ebert v. Lamar Truck Plaza, 878 F.2d 338 (10th Cir. 1989) (affirming district court finding that alleged unwelcome touching was sparse and not

pervasive); Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir.1986) (plaintiff's working environment was held not to be sufficiently hostile, even though she had been slapped on the buttocks). "In cases where courts have found physical contact to constitute harassment, the conduct has usually been much more egregious." See, e.g., Campbell v. Kansas State University, 780 F. Supp. 755, 762 (D. Kan. 1991) (defendant's conduct in slapping plaintiff's buttocks was "patently abusive"); Ulrich v. K-Mart Corp., 858 F. Supp. 1087, 1091 (D. Kan. 1994) (co-worker repeatedly grabbed plaintiff, pressed against her, felt her breasts, and placed his hands between her legs). Considering the totality of the circumstances as presented and supported by the evidence, the incidents of misconduct in this case resulting from sexual animus or gender bias were relatively isolated and were not severe or pervasive enough to create an environment that a reasonable juror could properly find hostile and abusive. Harris, 510 U.S. at 21. Accordingly, defendants are entitled to summary judgment on plaintiff's sexual harassment claim.

B. Retaliation

To establish a prima facie retaliation claim under Title VII, a plaintiff must show "(1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's adverse action." Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996). "The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982). Once a plaintiff succeeds in establishing a prima facie case of retaliation, the

burden shifts to the employer to proffer legitimate, nondiscriminatory reasons for the adverse action. Berry, 74 F.3d at 986. If the employer sets forth legitimate nondiscriminatory reasons for the adverse action, the plaintiff must then establish that the defendant's reasons are merely a pretext for retaliation. Id. "The overall burden of persuasion remains on the plaintiff." Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993).

Defendants argue that Gillum fails to establish a prima facie case of retaliation because she provides no evidence of adverse action by FHLB. As the court noted in Jeffries v. State of Kan., Dept. of Social and Rehabilitation Services, "courts liberally define an adverse employment action." 946 F. Supp. 1556, 1567 (D. Kan. 1996) (citing Berry, 74 F.3d at 986). "'Adverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well.'" Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996) (quoting Collins v. State of Ill., 830 F.2d 692, 703 (7th Cir. 1987)). However, the Jeffries court noted, while adverse job actions cover more than measurable losses of salary or benefits, "not everything that makes an employee unhappy is an actionable adverse action." Smart, 89 F.3d at 441. To be actionable, the adverse employment action must be "material":

"[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996) (quoting Crady v. Liberty Nat'l Bank & Trust, 993 F.2d 132, 136 (7th Cir. 1993)).

The Jeffries court set out several examples of adverse employment actions, including decisions that have a demonstrable adverse impact on future employment opportunities or performances; demotions, adverse or unjustified evaluations and reports; transfer or reassignment of duties; failure to promote; and unfavorable letters of reference to prospective employers. Jeffries, 946 F. Supp. at 1567 (citations omitted). These examples of adverse employment action are consistent with the general notion that "'an adverse action is one that affects the terms, privileges, duration, or conditions of employment.'" Yerdon v. Henry, 91 F.3d 370, 378 (2nd Cir. 1996) (quoting Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993)).

Gillum alleges that she was subjected to retaliation for reporting her claims of sexual harassment by the following: 1) Waggoner treated her less favorably than he treated other employees; 2) Waggoner required her to report to him when she was going on break; 3) Waggoner called Gillum and Penry into his office and told them they should not have gone outside the compartment with complaints and threatened to fire them; and 4) on February 17, 1993, shortly after one of Penry's co-workers resigned, Waggoner stated to another of Penry's co-workers "well, there's one down and two to go." Noticeably lacking from these disagreeable events is any "adverse employment action," as defined above, following or contemporaneous with her complaint. The court thus finds that defendants are entitled to summary judgment on plaintiff's retaliation claim.

C. Constructive Discharge

To establish constructive discharge, plaintiff must demonstrate that defendant, by its illegal discriminatory acts, made working conditions so difficult that a reasonable person in her position would feel compelled to resign. Daemi v. Church's Fried Chicken, 931 F.2d 1379, 1386 (10th Cir. 1991). This standard is applied objectively; the plaintiff's subjective views are irrelevant to the inquiry. Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982). "The intolerable conditions necessary for a constructive discharge claim must be the result of the employer's discriminatory acts, not plaintiff's general discontent with the insensitivity of her fellow employees." 950 F. Supp. 1091, *1097 (D. Kan. 19) (citing Hirschfeld, 916 F.2d at 580). Moreover, a finding of hostile work environment does not compel a finding of constructive discharge. Campbell, 780 F. Supp. at 765.

Gillum bases her constructive discharge claim on the same incidents of Waggoner's conduct upon which she bases her hostile work environment claim, and which are fully discussed above. The court finds, however genuine plaintiff's distress, Waggoner's conduct cannot be reasonably described as creating an intolerable working environment. Accordingly, defendants are entitled to summary judgment on plaintiff's constructive discharge claim.

C. Intentional Infliction of Emotional Distress

Defendants seek summary judgment on Gillum's intentional infliction of emotional distress claim. To establish a claim of intentional infliction of emotional distress, commonly referred to as the tort of outrage, a plaintiff must demonstrate four elements: (1) the conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal

connection between defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe. Moore v. State Bank of Burden, 240 Kan. 382, 729 P.2d 1205, 1211 (Kan. 1986) (citing Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 662 P.2d 1214 (Kan. 1983). For Penry's claim to survive summary judgment, the court must, as a matter of law, first determine that reasonable fact finders might differ as to: (1) whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and (2) whether plaintiff's emotional distress was so extreme and severe that the law must intervene because no reasonable person should be expected to endure it. Id. (citing Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175, 1179 (Kan. 1981). Conduct is not extreme and outrageous unless it is regarded as being "beyond the bounds of decency and utterly intolerable in a civilized society." Id. The threshold requirements for outrage causes of action are "necessarily high to separate meritorious claims from those based on trivialities or hyperbole." Rupp v. Purolator Courier Corp., 790 F. Supp. 1069, 1073 (D. Kan. 1992) (citing Fletcher v. Wesley Medical Center, 585 F. Supp. 1260, 1261-62 (D. Kan. 1984)).

Intentional infliction of emotional distress "is not a favored cause of action under Kansas law." Beam v. Concord Hospitality, Inc., 873 F. Supp. 491, 501 (D. Kan. 1994) (quoting E.E.O.C. v. General Motors Corp., 713 F. Supp. 1394, 1396-97 (D. Kan. 1989)). "The Kansas courts have been reluctant to extend the outrage cause of action to discrimination claims, including claims of sexual harassment, arising in the employment setting." Id. (quoting Laughinghouse v. Risser, 754 F. Supp. 836, 843 (D. Kan. 1990)). The existence of a hostile work environment sufficient to support a Title VII does not necessarily require a finding of outrageous conduct. See, e.g., 1997 WL 161942, *16 (D. Kan.); Anspach v.

Tomkins Indus., Inc., 817 F. Supp. 1499, 1507 (D. Kan. 1993), aff'd, 51 F.3d 285, (10th Cir. 1995).

The few cases in which courts have permitted outrage claims to survive summary judgment motions have involved repeated physical threats and racially or sexually abusive language. See, e.g., Laughinghouse, 754 F. Supp. at 836; Gomez v. Hug, 7 Kan. App. 2d 603, 645 P.2d 916 (Kan. Ct. App. 1982). In Laughinghouse, the plaintiff was the victim of sexual harassment and abuse from her supervisor described as "a concerted effort to terrorize her and to intentionally break her spirit." 754 F. Supp. at 843. Such harassment and abuse took the forms of screaming, cursing, sexual comments and unwanted touching, fits of rage which included tearing up files and throwing things, threats of termination and other tactics. Id. Evidence in that case indicated that the defendant mounted a concerted effort to terrorize the plaintiff and to treat her "like an animal." Id. Similarly, the defendant in Gomez subjected the plaintiff to vulgar, racist expressions and threats of violence resulting in potentially serious medical problems. 645 P.2d at 918.

Defendants contend that summary judgment is warranted for Gillum's intentional infliction of emotional distress claim because, even viewing the facts in the light most favorable to plaintiff, the facts do not demonstrate conduct so extreme or outrageous as to permit recovery under the tort of outrage. The incidents upon which plaintiff bases her claim are those same incidents upon which she bases her Title VII claim, and which are fully discussed above. In determining whether Waggoner's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for the tort of outrage, however, the court is not limited to considering only that conduct resulting from gender bias or sexual animus. The court may instead consider all of Waggoner's conduct

which Gillum alleges supports her claim. n1 Nevertheless, the court is not persuaded that a reasonable fact finder could find Waggoner's behavior so outrageous that it transcends the bounds of decency and is utterly intolerable in a civilized society. Unlike the defendant's conduct in Laughinghouse or Gomez, Waggoner's conduct did not include threats of physical violence. Nor did Waggoner's conduct include unwelcome sexual advances or sexually offensive touching or groping. Granted, the evidence presented by Gillum paints a less than flattering picture of Waggoner, but his behavior was not so extreme and outrageous as to sustain a claim for intentional infliction of emotional distress.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The court does not agree with Gillum's argument that it should consider Waggoner's misconduct toward her co-workers as support for her intentional infliction of emotional distress claim.

Likewise, FHLB's conduct in responding to Gillum's complaints cannot be described as "beyond the bounds of decency and utterly intolerable in a civilized society." FHLB had a policy against sexual harassment that was set forth in its employee handbook; it had procedures in place to allow Gillum to bypass Waggoner in reporting grievances; and it responded in some manner to all of Gillum's complaints about Waggoner's conduct. In Anspach, the court described the employer's efforts to stop harassment of the plaintiff as "woefully inadequate" because the harassment in fact increased in response. 817 F. Supp. at 1507. Still, the Anspach court held that, as a matter of law, the employer's conduct was not so extreme as to sustain a claim for intentional infliction of emotional distress. In contrast to the employer's

response in Anspach, FHLB's response to Gillum's complaints was far more effective.

The defendants' conduct may not reasonably be regarded as so extreme and outrageous as to be considered "beyond the bounds of decency and utterly intolerable in a civilized society." Accordingly, the court grants summary judgment in favor of defendants on plaintiff's claim of intentional infliction of emotional distress.

IT IS THEREFORE BY THE COURT ORDERED that defendants' Motion for Summary Judgment (Doc. 26) is granted.

Dated this 17 day of June, 1997, at Topeka, Kansas.

/s/ DALE E SAFFELS

United States District Judge

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant United States of America is dismissed with prejudice and any claims for attorney fees or costs are waived.

IT IS FURTHER ORDERED AND ADJUDGED that defendants Federal Home Loan Bank of Topeka and Charles Waggoner's motion for summary judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff takes nothing and this action is dismissed on the merits.

Entered on the docket 6/17/97
Dated: June 17, 1997

CIVIL ACTION Case No. 94-4196-DES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MICHELE PENRY, Plaintiff, v. FEDERAL HOME LOAN BANK OF TOPEKA and its representatives, and CHARLES R. WAGGONER as defendants' representative and individually, Defendants.

June 10, 1997, Decided
June 10, 1997, FILED; June 10, 1997, ENTERED ON THE DOCKET

COUNSEL: For MICHELE PENRY, plaintiff: Cheryl D. Myers, Michael B. Myers, Myers & Myers, Topeka, KS.

For FEDERAL HOME LOAN BANK, of Topeka and its representatives, CHARLES R WAGGONER, in his capacity as defendants' representative and in his individual capacity, defendants: Wesley A. Weathers, Weathers & Riley, Topeka, KS.

JUDGES: DALE E. SAFFELS, United States District Judge

OPINIONBY: DALE E. SAFFELS

OPINION: MEMORANDUM AND ORDER

This matter is before the court on defendants' Motion for Summary Judgment (Doc. 104). Plaintiff has filed a Memorandum in Opposition to Defendants' Motion (Doc. 121). Defendants have filed a Reply (Doc. 141). This case arises out of plaintiff's claim of hostile work environment and

retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and for intentional infliction of emotional distress. For the reasons set forth below, defendants' motion is granted.

I. FACTS

The following facts are either uncontroverted or, if controverted, construed in a light most favorable to the plaintiff as the non-moving party. Immaterial facts and factual averments not properly supported by the record are omitted.

Federal Home Loan Bank of Topeka ("FHLB") employed Michele Penry ("Penry") as a clerk in its collateral department from February 1989 to March 1994, first under the supervision of Sonia Betsworth ("Betsworth") and then, beginning in November of 1992, under the supervision of Charles Waggoner ("Waggoner"). In March 1994, FHLB transferred Penry to another department, where she is currently employed.

FHLB hired Waggoner in November of 1989 as the collateral review manager. As part of his duties, Waggoner conducted on-site inspections of collateral at the borrowing financial institutions. The collateral assistants, including Penry, Debra Gillum ("Gillum"), and Sherri Bailey ("Bailey"), and the collateral review assistant, Sally Zeigler ("Zeigler"), took turns accompanying Waggoner on these inspection trips. As the collateral review manager, Waggoner supervised only the collateral review assistant, Zeigler. He did not supervise any of the collateral assistants until he was named collateral officer in November 1992. On trips, however, Waggoner was clearly in charge and was responsible for evaluating the collateral assistants that accompanied him.

During the time Waggoner worked with Penry, first as co-worker and then as her supervisor, he engaged in conduct which Penry claims created a hostile work environment within the meaning of Title VII. Penry presents evidence of numerous instances of Waggoner's alleged misconduct. These and other relevant material facts are set forth in more detail throughout the court's discussion.

II. SUMMARY JUDGMENT STANDARD

A court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1985). The substantive law identifies which facts are material. Id. at 248. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. Id. "Only disputes over facts that might properly affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

The movant has the initial burden of showing the absence of a genuine issue of material fact. Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir. 1993). The movant may discharge its burden "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1985). The movant need not negate the nonmovant's claim. Id. at 323.

Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1985). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. Celotex, 477 U.S. at 324 (interpreting Fed. R. Civ. P. 56(e)). Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. Id. at 322. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. Id. at 323.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. See, e.g., United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986) (stating that "the court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues"). The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. Anderson, 477 U.S. at 249. Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. Id. at 250.

III. DISCUSSION

A. Sexual Harassment--Hostile Work Environment

Title VII prohibits sexual harassment in the workplace. Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). Sexual harassment under Title VII may be shown under either of two principal theories: quid pro quo discrimination or hostile work environment. Id. at 65-66. Plaintiff has made no quid pro quo claim that sexual favors were coerced in exchange for employment benefits. See Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). Rather, she charges that discrimination based on sex created a hostile or abusive work environment.

A hostile work environment exists when a plaintiff is subjected to sexual harassment "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'" Meritor, 477 U.S. at 67 (citation omitted). Sexual harassment is behavior "'that would not occur but for the sex of the employee' . . . . 'If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination.'" Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995) (citations omitted).

In Harris v. Forklift Sys., Inc., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993), the Court stated:

Conduct that is not severe or pervasive enough to create an objectively hostile environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

This court, therefore, must determine whether a reasonable jury, considering the admissible evidence as presented by

plaintiff in opposition to defendants' motion for summary judgment, could find that the alleged conduct was: 1) pervasive or severe enough to objectively alter the terms, conditions or privilege of employment; and 2) whether the admissible evidence demonstrates that the conduct was gender based or stemmed from sexual animus. Gross, 53 F.3d at 1539 (citations omitted). This determination must be made "in light of 'the record as a whole' and 'the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" [*838] Id. at 1537 (quoting Meritor, 477 U.S. at 69).

In opposition to defendants' summary judgment motion, Ms. Penry presents evidence, in the form of deposition testimony, of numerous instances of Waggoner's conduct which she contends establishes the existence of a hostile work environment. The court will first examine each of these situations for the purpose of determining whether they were gender based or stemmed from sexual animus. The court will then determine whether Waggoner's conduct was pervasive or severe enough to alter the terms, conditions or privilege of employment.

Penry presents deposition testimony showing that Waggoner, after becoming her supervisor, forced her to tell him when she went on breaks, followed her to the door of the restroom, and required her to account for her time on detailed forms. Penry contends that this conduct would not have occurred but for her gender. She argues that "Waggoner's obvious fascination with woman's daily routine . . . is inherently sexual in nature." Penry presents no evidence, however, other than speculation, that these activities were motivated by sexual animus or gender bias. Indeed, Penry states in her deposition that the true motivation for this conduct was retaliation for her complaints to Betsworth. As such, this conduct, though offensive, cannot be construed as being motivated by sexual

animus or gender bias. Likewise, Penry's other allegations of retaliation by Waggoner, such as his remark after Bailey's resignation that there was "one down and two to go," and his April 27, 1993, meeting with Penry and Gillum to "clear the air," cannot be characterized as motivated by sexual animus or bias.

Penry also cites evidence showing that Waggoner played pranks on her. One prank he played six to ten times, primarily while she was pregnant. According to Penry, Waggoner would sneak up behind her, place his hands on her shoulders and loudly say her name to scare her. The other two pranks were one time occurrences. One in June 1990 where Waggoner knocked on her hotel door and then hid, and the other where he removed his hands from the steering wheel while driving an automobile in which Penry as a passenger. In her response, Penry states that she does not characterize these acts as "sexual acts per se," but argues they nevertheless constitute sexual harassment because "they illustrate Waggoner's male dominance over female employees in captive situations." The court disagrees. Penry presents no evidence, other than speculation, that these activities were motivated by sexual animus or gender bias. In her deposition, Penry states she did not know what motivated such conduct by Waggoner. Penry also fails to provide legal support for her "male dominance" theory, and the court is not persuaded to construe what appears to be gender-neutral buffoonery as a demonstration of "male dominance" over "captive" female employees. The fact that Penry may have been "isolated and alone" in her work cubicle or "captive" in Waggoner's car does not convert gender-neutral pranks into conduct motivated by sexual animus or gender bias.

Penry also opposes defendants' summary judgment motion with evidence of Waggoner's conduct during out-of-town

work assignments. Penry complains that in March 1990, Waggoner did not help her lift heavy boxes during an on-site inspection of a bank and that she was required to eat dinner with Waggoner during out-of-town inspections. She also complains that while on an out-of-town inspection, Waggoner told her to find a ride back to her hotel from a bank employee because he would be out inspecting property. Penry offers no evidence that these episodes resulted from gender bias or animus. To the contrary, they appear to be gender neutral, as do Waggoner's comments, during a business trip, about his marital problems. Penry argues that the bank's travel and dining arrangements "provided a ready arena for Waggoner's sexual conduct." The court finds no merit to this argument. Likewise, Penry's claim that the assignment to travel with Waggoner constitutes sexual harassment is also unavailing. Without evidence to the contrary, management decisions, even if injudicious, may not be characterized as due to gender. See Ballou v. University of Kanas Medical Ctr., 871 F. Supp. 1384, 1390 (D. Kan. 1994).

Penry next opposes defendants' summary judgment motion by offering evidence of Waggoner's offensive comments and outbursts. Penry complains that Waggoner often yelled at Betsworth for her errors, that he demeaned Betsworth behind her back, and said that all women in the safekeeping department were "dumb" and that his wife was "ignorant." Penry also complains about Waggoner's use of the term "gals" to refer to the women in his department. Betsworth testified that Waggoner yelled at her and she yelled at him, but she never felt he was abusive to her. While such antics may contribute to an offensive or even "hostile" environment, there is no evidence that this hostility derived from some gender-based animosity or bias. The Tenth Circuit has held that criticism of an employee's work, without some type of gender-specific reference, is not gender-based conduct. Gross, 53 F.3d at 1545-46.

Additionally, "dumb" is a gender neutral term since it can apply equally to both sexes. Id. at 1543; Young v. Finish Line, Inc., 1995 WL 472783 at *5 (D. Kan.). This reasoning also applies to Waggoner's use of the term "ignorant." Significantly, Penry stated in her deposition that Waggoner's use of the term "dumb" to refer to the women in the safekeeping department was not due to sexual animus, but was an example of his general tendency of excusing his own mistakes by shifting blame to other parties. Finally, Penry presents no evidence that Waggoner's use of the term "gals" stemmed from sexual animus. According to Waggoner, he used the term out of habit, not out of sexual animus. Moreover, it appears that it was not the term itself that offended Penry, but that it was used by Waggoner. Penry stated that she was not offended when her prior female supervisor referred to Penry and other collateral department employees as "her girls."

Penry also complains that in April 1993, she and Waggoner disagreed over an irregular transaction in the file of a member bank for which she was responsible. When Penry kept insisting that the irregularity was not a mistake, Waggoner, while seated at his desk, shouted to "just sit down and shut up a minute." Penry, afraid that he would "come up out of the chair," exited his office and he followed her shouting " Michele, you're insubordinate. I don't have to take this off of you." Although Waggoner's outburst may have been rude and unprofessional, Penry has made no showing that this outburst would not have occurred but for her sex. Penry presents no evidence that Waggoner physically threatened her other than her statement that she believed "he might come up out of the chair" and that he had a "glazed look in his eye like he was crazy." There is evidence, however, that Waggoner's hostility was motivated by his belief that Penry was not properly doing her job. As such, "Title VII . . . does not give a woman immunity from being reprimanded in the presence of her co-

workers if her supervisor believes that she has violated work rules or has been negligent in performing her job." Gross, 53 F.3d at 1545-46.

Penry next complains that on an out-of-town trip, Waggoner, while at dinner with Penry, ordered mixed drinks called "sex on the beach" and "'cum' in a hot tub." Penry presents no evidence that Waggoner made any sexual overtures toward her or any sexual comments other than to order the drink. As such, merely ordering a drink with a vulgar name, while crude behavior in a business setting, does not demonstrate sexual animus or gender bias. Waggoner's remark in October 1990 that the man at the next table "had his hand up the woman's dress and they might as well be having sex" is similarly crude and impolite. So is his October 1991 reference to the Crossroads Mall in Nebraska as looking like "two hooters" or as the "bra bazaar" or the "boobs up" mall. Nevertheless, the court is not convinced that Waggoner would not have made these remarks but for Penry's gender. To the contrary, it seems likely, in light of Penry's testimony regarding Waggoner's conduct, that he would have made the same remark to any associate, male or female, he may have been traveling with. Again, while such conduct in a business environment might demonstrate a certain degree of baseness, it does not demonstrate sexual animus or gender bias, and Penry presents no evidence to the contrary.

Finally, Penry claims the evidence shows that: 1) In March 1990, while at dinner on an out-of-town trip, Waggoner asked her whether women have "wet dreams"; 2) in October 1990, while on an out-of-town trip, Waggoner mentioned that her bra strap was showing, "but that he kind of liked it"; 3) in March 1991, Gillum overheard Waggoner remark to a male co-worker that he could get into the drawers of another female worker, possibly Penry; 4) in the fall of 1992, before

Waggoner became her supervisor, he asked her what she was wearing under her dress; and 5) Waggoner demeaned only women when he "gossiped" with Penry. The court has no doubt that of the five preceding statements a reasonable jury could find statements one and four resulted from gender bias or sexual animus. As to the other three, the court is not so sure. Nevertheless, for purposes of this summary judgment motion, all five of the numbered statements will be construed as being motivated by gender bias or sexual animus.

The next question is whether Waggoner's conduct was pervasive or severe enough to objectively alter the terms, conditions or privilege of Penry's employment. The Supreme Court said this standard is the middle ground between one that makes merely offensive conduct actionable and a standard that requires a psychological injury. Harris, 510 U.S. at 22. A "mere utterance of an . . . epithet which engenders offensive feelings in an employee," Meritor, 477 U.S. at 67, "does not impact a condition of employment and, therefore, does not implicate Title VII." Harris, 510 U.S. at 21. On the other hand, Title VII becomes an issue before the employee suffers a nervous breakdown. Id. at 22. Circumstances to consider in each case include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Id. Only that conduct which the court has found to be discriminatory, i.e., resulting from gender bias or sexual animus, will be considered at this stage of the inquiry. See Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994) ("General harassment if not racial or sexual is not actionable.").

Waggoner made four gender based comments and engaged in an unspecified amount of "gossip" between spring of 1990

and fall of 1992. The court is not convinced, however, that a reasonable jury, considering all of the circumstances of this case, could find them to have created an objectively hostile work environment that altered the conditions of plaintiff's employment. None of Waggoner's conduct was physically threatening and Penry has not alleged any sexually offensive touching or unwelcome sexual advances. Considering the totality of the circumstances as presented and supported by the evidence, the incidents of misconduct resulting from sexual animus or gender bias were relatively isolated and do not constitute a "steady barrage of opprobrious" sexual comments as contemplated by the Tenth Circuit. See Gross, 53 F.3d at 1539. Accordingly, defendants are entitled to summary judgment on plaintiff's sexual harassment claim.

B. Retaliation

To establish a prima facie retaliation claim under Title VII, a plaintiff must show "(1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's adverse action." Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996). "The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982). Once a plaintiff succeeds in establishing a prima facie case of retaliation, the burden shifts to the employer to proffer legitimate, nondiscriminatory reasons for the adverse action. Berry, 74 F.3d at 986. If the employer sets forth legitimate nondiscriminatory reasons for the adverse action, the plaintiff must then establish that the defendant's reasons are merely a pretext for

retaliation. Id. "The overall burden of persuasion remains on the plaintiff." Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993).

Defendants argue that Penry fails to establish a prima facie case of retaliation because she provides no evidence of adverse action by FHLB. As the court noted in Jeffries v. State of Kan., Dept. of Social and Rehabilitation Services, "courts liberally define an adverse employment action." 946 F. Supp. 1556, 1567 (D. Kan. 1996) (citing Berry, 74 F.3d at 986). "'Adverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well.'" Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996) (quoting Collins v. State of Ill., 830 F.2d 692, 703 (7th Cir. 1987)). However, the Jeffries court noted, while adverse job actions cover more than measurable losses of salary or benefits, "not everything that makes an employee unhappy is an actionable adverse action." Smart, 89 F.3d at 441. To be actionable, the adverse employment action must be "material:"

"[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996) (quoting Crady v. Liberty Nat'l Bank & Trust, 993 F.2d 132, 136 (7th Cir. 1993)).

The Jeffries court set out several examples of adverse employment actions, including decisions that have a demonstrable adverse impact on future employment opportunities or performances; demotions, adverse or unjustified evaluations and reports; transfer or reassignment of duties; failure to promote; and unfavorable letters of reference to prospective employers. Jeffries, 946 F. Supp. at 1567 (citations omitted). These examples of adverse employment action are consistent with the general notion that "'an adverse action is one that affects the terms, privileges, duration, or conditions of employment.'" Yerdon v. Henry, 91 F.3d 370, 378 (2nd Cir. 1996) (quoting Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993)).

Penry alleges that she was subjected to retaliation for reporting her claims of sexual harassment by the following: 1) In January 1992, Betsworth and Cnossen required her to "say an exact sentence to stop sexual harassment"; 2) on March 1, 1993, Waggoner required her to report to him when she was going on break; and 3) on April 27, 1993, after she complained to Roger Williams about Waggoner, Waggoner called Penry and Gillum into his office and told them they should not have gone outside the compartment with complaints and threatened to fire them; and 4) on February 17, 1993, shortly after one of Penry's co-workers resigned, Waggoner stated to another of Penry's co-workers "well, there's one down and two to go." Noticeably lacking from these disagreeable events is any "adverse employment action," as defined above, following or contemporaneous with her complaint. The court thus finds that defendants are entitled to summary judgment on plaintiff's retaliation claim.

C. Intentional Infliction of Emotional Distress

Defendants seek summary judgment on Penry's intentional infliction of emotional distress claim. To establish a claim of intentional infliction of emotional distress, commonly referred to as the tort of outrage, a plaintiff must demonstrate four elements: (1) the conduct of defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe. Moore v. State Bank of Burden, 240 Kan. 382, 729 P.2d 1205, 1211 (Kan. 1986) (citing Hoard v. Shawnee Mission Medical Center, 233 Kan. 267, 662 P.2d 1214 (Kan. 1983). For Penry's claim to survive summary judgment, the court must, as a matter of law, first determine that reasonable fact finders might differ as to: (1) whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and (2) whether plaintiff's emotional distress was so extreme and severe that the law must intervene because no reasonable person should be expected to endure it. Id. (citing Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175, 1179 (Kan. 1981). Conduct is not extreme and outrageous unless it is regarded as being "beyond the bounds of decency and utterly intolerable in a civilized society." Id. The threshold requirements for outrage causes of action are "necessarily high to separate meritorious claims from those based on trivialities or hyperbole." Rupp v. Purolator Courier Corp., 790 F. Supp. 1069, 1073 (D. Kan. 1992) (citing Fletcher v. Wesley Medical Center, 585 F. Supp. 1260, 1261-62 (D. Kan. 1984)).

Intentional infliction of emotional distress "is not a favored cause of action under Kansas law." Beam v. Concord Hospitality, Inc., 873 F. Supp. 491, 501 (D. Kan. 1994) (quoting E.E.O.C. v. General Motors Corp., 713 F. Supp. 1394, 1396-97 (D. Kan. 1989)). "The Kansas courts have been

reluctant to extend the outrage cause of action to discrimination claims, including claims of sexual harassment, arising in the employment setting." Id. (quoting Laughinghouse v. Risser, 754 F. Supp. 836, 843 (D. Kan. 1990)). The existence of a hostile work environment sufficient to support a Title VII does not necessarily require a finding of outrageous conduct. See, e.g., 1997 WL 161942, *16 (D. Kan.); Anspach v. Tomkins Indus., Inc., 817 F. Supp. 1499, 1507 (D. Kan. 1993), aff'd, 51 F.3d 285, (10th Cir. 1995).

The few cases in which courts have permitted outrage claims to survive summary judgment motions have involved repeated physical threats and racially or sexually abusive language. See, e.g., Laughinghouse, 754 F. Supp. at 836; Gomez v. Hug, 7 Kan. App. 2d 603, 645 P.2d 916 (Kan. Ct. App. 1982). In Laughinghouse, the plaintiff was the victim of sexual harassment and abuse from her supervisor described as "a concerted effort to terrorize her and to intentionally break her spirit." 754 F. Supp. at 843. Such harassment and abuse took the forms of screaming, cursing, sexual comments and unwanted touching, fits of rage which included tearing up files and throwing things, threats of termination and other tactics. Id. Evidence in that case indicated that the defendant mounted a concerted effort to terrorize the plaintiff and to treat her "like an animal." Id. Similarly, the defendant in Gomez subjected the plaintiff to vulgar, racist expressions and threats of violence resulting in potentially serious medical problems. 645 P.2d at 918.

Defendants contend that summary judgment is warranted for Penry's intentional infliction of emotional distress claim because, even viewing the facts in the light most favorable to plaintiff, the facts do not demonstrate conduct so extreme or outrageous as to permit recovery under the tort of outrage. The incidents upon which plaintiff bases her claim are those

same incidents upon which she bases her Title VII claim, and which are fully discussed above. In determining whether Waggoner's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for the tort of outrage, however, the court is not limited to considering only that conduct resulting from gender bias or sexual animus. The court may instead consider all of Waggoner's conduct which Penry alleges supports her claim. n1 Nevertheless, the court is not persuaded that a reasonable fact finder could find Waggoner's behavior so outrageous that it transcends the bounds of decency and is utterly intolerable in a civilized society. Unlike the defendant's conduct in Laughinghouse or Gomez, Waggoner's conduct did not include threats of physical violence. Nor did Waggoner's conduct include unwelcome sexual advances. Granted, the evidence presented by Penry paints a less than flattering picture of Waggoner, but his behavior was not so extreme and outrageous as to sustain a claim for intentional infliction of emotional distress.

Likewise, FHLB's conduct in responding to Penry's complaints cannot be described as "beyond the bounds of decency and utterly intolerable in a civilized society." FHLB had a policy against sexual harassment that was set forth in its employee handbook; it had procedures in place to allow Penry to bypass Waggoner in reporting grievances; and it responded in some manner to all of Penry's complaints about Waggoner's conduct. In Anspach, the court described the employer's efforts to stop harassment of the plaintiff as "woefully inadequate" because the harassment in fact increased in response. 817 F. Supp. at 1507. Still, the Anspach court held that, as a matter of law, the employer's conduct was not so extreme as to sustain a claim for intentional infliction of emotional distress. In contrast to the employer's response in Anspach, FHLB's response to Penry's complaints was far more effective.

The defendants' conduct may not reasonably be regarded as so extreme and outrageous as to be considered "beyond the bounds of decency and utterly intolerable in a civilized society." Accordingly, the court grants summary judgment in favor of defendants on plaintiff's outrage claim.

IT IS THEREFORE BY THE COURT ORDERED that defendants' Motion for Summary Judgment (Doc. 104) is granted.

Dated this 10 day of June, 1997, at Topeka, Kansas.

DALE E. SAFFELS

United States District Judge

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The court does not agree with Penry's argument that it should consider Waggoner's misconduct toward her co-workers as support for her intentional infliction of emotional distress claim.

Before PORFILIO, McKAY and TACHA, Circuit Judges.

No. 97-3203, No. 97-3204

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHELE PENRY, Plaintiff - Appellant, v. FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity, Defendants - Appellees. DEBRA ANN GILLUM, Plaintiff - Appellant, v. FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity, Defendants - Appellees. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae.

ORDER
Filed 10/16/98

Appellants' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in reaular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER Clerk of Court
by:
Deputy Clerk

No. 97-3203, No. 97-3204

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MICHELE PENRY, Plaintiff - Appellant, v. FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity, Defendants - Appellees. DEBRA ANN GILLUM, Plaintiff - Appellant, v. FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity, Defendants - Appellees. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae.

Before PORFILIO, McKAY, and TACHA, Circuit Judges.

This matter is before the court on appellees' bills of costs on appeal submitted for the two appeals, respectively, together with appellants' consolidated memorandum objection to appellees' bills of costs, In an opinion entered September 15, 1998 this court affirmed the district court orders for summary judgment on all claims, Appellants' petition for rehearing was denied October 16, 1998. Under this circumstance, certain costs of the appeals may be taxed pursuant to Fed. R. App. P. 39. Appellees claim verified and documented costs of copying and binding the briefs and appendices.

Appellees' bill of costs in appeal no. 97-3203 is granted in the amount of $581.49, and appellees' bill of costs in appeal no. 97-3204 is granted in the amount of$501.18. See

Bancamerica Commercial Corp. v. Mosher Steel, 103 F.3d 80 (10th Cir, 1996); In re Penn Central Transp. C0., 630 F.2d 183, 191 (3rd Cir. 1980).

Entered for the Court
PATRICK FISHER, Clerk of Court

42 USCS § 2000e (1998)
§ 2000e. Definitions

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 USCS § 2000e-2 (1998)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [-2000e-17].

FEDERAL RULES OF CIVIL PROCEDURE
VII. JUDGMENT

56(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FEDERAL RULES OF APPELLATE PROCEDURE
RULE 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgnient is affirmed in part, reversed in part, modified, or

vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerks office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must-within 14 days after entry of judgment-file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must-upon the circuit clerk's request-add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

CHART OF INCIDENTS		FOOTNOTE 1		
	Date	**Incident of Charles Waggoner Conduct**	**Environment Created**	**Cite To Record**
1	1/90	Alone in car told Gillum had sex with 2 young women her age.	Fear of rape, sexual control, fear of future sexual advances.	Aplt. App. At 149 (Fact 14); 347-353
2	1/90	Reserved only one hotel room; Gillum embarrassed before desk clerk.	Public humiliation, sexual control, fear of rape, fear of sexual advances.	Aplt.App. At 149 (Fact 15); 354-356
3	1/90	Alone at Imperial Savings Bank looking at documents, leaned heavily into her breathing on her neck and continued to lean on her when Gillum moved her chair to get away.	Fear of rape, sexual control, believed were sexual advances.	Aplt.App. At 150.

4	3/19/90	Asked Penry if women have wet dreams.	Fear, sexual control	Aplt. App. At 150 (Fact 21); 558-560
5	4/90	Demanded Gillum go into the Hooter's Bar or stay in the car in the dark.	Fear, sexual control	Aplt. App. At 151(Fact22);364-367
6	4/90	Appeared sexually aroused to Gillum while bent down to look at waitresses' bottoms, remarked to a waitress that her hooters were sure "stretched tight," asked if he could see her "hooters" and whether she had sex on the beach.	Fear of physical harm, sexual control, public humiliation for Gillum and Hooters waitresses, belittled.	Aplt.App. At 151 (Fact 22); 364-367, 462.
7	4/90	Appeared sexually aroused to Gillum while ordered drinks called Cum in a Hot Tub" and "Sex on the Beach". (Same conduct in front of Penry on other days)	Fear of physical harm, sexual control, public humiliation for Gillum, Penry, and waitresses.	Aplt.App. At 151(Fact 22); 364-367, 928.

8	4/90	Gillum told Penry and Bailey what happened at the Hooters Bar.	Knowledge of sexual conduct, control and public humiliation of females.	Aplt.App. At 151, 152 (Fact 25); 366..
9	4/15/90	Gesturing by holding his hips, told Gillum she should walk to get weight off her hips.	Demeaning. Insult, ridicule.	Aplt.App. At 152.
10	6/25/90	Knocked on Penry's motel door at midnight, hid, then pressed face against the window causing Penry to scream with fright.	Fear, physically threat-ening, control, invasion of privacy, sexual overtones.	Aplt.App. At 152-153(Fact 30); 566, 567, 929.
11	6/25/90	Immediate written derogatory evaluation of Penry for report-ing behavior at motel door.	Control, threat against reporting his actions, retaliation.	Aplt.App. At 152-153 (Fact30);566, 567.
12	10/9/90	Stated Penry's bra strap was showing but he kind of liked it.	Sexual control, humilia-tion, fear of sexual advance.	Aplt.App. At 153(Fact 32); 570,572.

13	11/5/90	Alone in car with Gillum when stated that a mall roof looked like a couple of big "boobs".	Sexual control, fear.	Aplt. App. At 153 (Fact 35); 375, 376.
14	3/91	Stated in the hearing of Gillum and Bailey to a male employee that Penry allowed him to get in her drawers any time he wanted to.	Public humiliation (open cubicles), sexual control, knowledge of sexual conduct toward other females.	Aplt.App. At 155 (Fact47);379,380.
15	3/91	Gillum told Penry his "drawers" comment.	Public humiliation, sexual control, knowl-edge of sexual conduct toward other females.	Aplt.App. At 155(Fact 47);379,380.
16	5/20/91	Forced Gillum to work in his motel room. Gillum opened door and blinds so public see if tried to harm her.	Public humiliation, control, fear of sexual advance/assault.	Aplt.App. At 156(Fact48); 412.
17	8/19/91	Bailey told Penry and Gillum, Waggoner humiliated and	Fear, sexual control, knowledge of sexual	Aplt.App. At 157(Fact 57); 262-263.

		frightened her by his demand she take his hotel room key out of his pocket.	conduct toward other females.	
18	4/91	Bailey told Penry and female supervisor Betsworth that Waggoner made repeated sexual remarks to her; pointed out waitress and exclaimed "Look at those Hooters!"	Public humiliation, control, knowledge of sexual conduct toward other females.	Aplt.App. At 157, 158 (Fact 60); 246;250;230,577,775.
19	10/9/91	Riding in the car alone with Penry, told her that the top of a mall roof looked like two "hooters".	Sexual control and preoccupation, fear of sexual advances.	Aplt.App. At 156 (Fact 54), 574,575.
20	4/91	Bailey told Penry and female supervisor Betsworth that he turned off overhead light in restaurant booth, slid around the table and put his arm around Bailey.	Sexual control, public humiliation, knowledge of sexual conduct toward other females.	Aplt.App. At 158(Fact 61); 876;877.

21	4/92	Uninvited to Penry's wedding but attended.	Control, invasion of privacy.	Aplt.App. At 160 (Fact 74); 508-510.
22	11/92	Management made Waggoner Gillum, Penry and Bailey's full time direct supervisor. All three women cried in the announcement meeting.	Increase in control, public humiliation.	Aplt. App. At 163, 167 (Fact 90, 112); 528,650,657,660,670-673.
23	11/92	Told Human Relations Manager within Gillum's hearing (only three feet away from her), that he had to move his office near to Gillum, Penry, and Bailey because they allegedly did no work and he could not trust them.	Control, public humiliation, intimidation.	Aplt.App. At 164(Fact 97), 338.
24	11.92	While appearing to be sexually excited, openly leered at Bailey's body in front of Penry and remarked about Bailey's	Sexual control, public humiliation, knowledge of sexual conduct toward other females.	Aplt.App. At 167 (Fact 113); 673.

		short skirt, (which was only just above the knee.)		
25	**11/92**	**Asked Penry what she was wearing under her dress.**	**Sexual control, fear.**	**Aplt.App. At 151-152 (Fact 84); 578,615,618.**
26	11/92	Told Gillum to mind her own business when she tried to talk to him about his sexual acts.	Sexual control, humiliation, abuse, lack of shame, out of control.	Aplt. App. At 164 (Fact 98); 338,339.
27	11/92	Told Gillum she looked "dressed down" when she forgot and wore a dress on "dress down" day.	Humiliation, ridicule.	Aplt.App. At 164(Fact 95), 386,
28	12/92	Asked Gillum to complete work in his office, stating in a lowered voice "Why don't you come in here and **do it** at my desk."	Sexual control, fear of sexual advance.	Aplt. App. At 165 (Fact 103); 464-467.
29	12/92	Yelled at Bailey in Gillum,	Control, public	Aplt.App. At 165,166

		Penry and female supervisor Betsworth presence "Bring your buns over here!" , then laughing when Bailey expressed embarrassment. Penry heard shouts to other females "get your butt over here!"	humiliation, knowledge of abuse of other females.	(Fact 105); 205;206;231-236,391,392, 931.
30	2/93	Penry and Bailey told one another that he had followed each of them to the bathroom.	Control, public humiliation, knowledge of abuse of other females, fear of sexual advance.	Aplt.App. At 167 (Fact 112); 664.
31	2/93	When learned Bailey resigned, stated to another employee in Gillum's presence that "...there's one down and two to go".	Control, public humiliation, abuse, knowledge of abuse of other females, retaliation, fear of losing job.	Aplt.App. At 168 (Fact 116); 676, 425-427.
32	2/12/93	When Penry complained to him about his sexual harassment and retaliation, laughed and said he	Sexual control, abuse, no hope for change of working conditions,	Aplt. App. At 166, 167 (Fact 110); 647-469, 677-680, 952.

		had a right to talk to women "that way" because Bank President did it too.	knowledge of sexual conduct toward other females, escalation.	
33	2/18/93	Penry and Gillum complain together to Human Resources Director about "wet dreams" comment and what Penry wearing under dress; mall roof comments, derogatory statements about Gillum;s body, trips to Hooters, and rubbing against Gillum while breathing excitedly.	Knowledge of sexual conduct toward other females. (Penry and Gillum mutual knowledge of sexual conduct toward other.)	Aplt.App.At 168,169 (fact 118, 1991); 690; 632-635,309.
34	2/18/93	Human Resources Director stared at Penry's breasts while Penry and Gillum reported Waggoner's sexual harassment.	Sexual conduct, public humiliation (Gillum present to see the breast staring), affirmation of control.	Aplt.App. At 168,169 (fact 118, 119); 690;632-635,309.
35	2/19/93	Penry told by Human Resources	Abusive and hostile	Aplt.App. 170 (Fact

		Director that Waggoner's sexual conduct was the women's fault and cut off further investigation.	environment, no hope of change in working conditions.	125); 739,740).
36	3/1/93	Announced to Penry and Gillum they could not be trusted, unreasonably increased their work load and demanded to know each time they were going to reastroom and stepped up following them on breaks and to the bathroom.	Abusive and hostile workplace, no hope of change in working conditions, control, public humiliation, fear of sexual advance.	Aplt. App. At 171 (Fact 128); 335-337,397-398,704-706; Aplt. App. At 167; 664..
37	3/93	Sexual assault and battery of Gillum by slowly sliding pelvis across her derriere and then pinning her to the file cabinet with his body when she tried to flee.	Sexual assault and battery, sexual control, sexual abuse, extreme fear.	Aplt.App. At 171-172 (Fact 130); 907.
38	4/6/93	Threatened and shouted at	Threats of physical	Aplt.App. At 172, 173

		Penry (seven months pregnant) in front of Gillum and in the hallway so that Penry and Gillum both believed he would hit them and Penry believed he was threatening to fire her. Penry was hysterical and Gillum was shaking.	violence, abuse of a pregnant woman, public humiliation, emotional distress.	(Fact 133, 519-524).
39	4/27/93	Forced Penry and Gillum to tell him the details of their reports of his sexual harassment to management, then threatened that he had fired women before and that Penry and Gillum were never to take complaints against him to management again.	Abusive control, denial of sexual harassment reporting procedures, threats of termination, knowledge of abuse of other women fired in past.	Aplt.App. At 176, 177 (Fact 153); 156,420-422,746,747,785.
40	4/27/93	Penry and Gillum immediately notified management of the firing threats of termination and denial of reporting procedures.	Perpetuated hostile work environment, abusive refusal to stop the sexual conduct.	Aplt.App.177 (Fact 155); 749-750.

		Management countered that sexual harassment was impossible to prove.		
41	5/93	Followed Penry (8 months pregnant) more frequently to bathroom and breakroom, abusively shouted at her and touched her more often.	Fear, physical abuse, threats of physical violence, public humiliation, sexual control, fear of future sexual advances.	Aplt.App. At 177 (Fact 157); 752-754.
42	5/12/93	Sexual assault. Leaned body on Gillum's shoulder and looked down her blouse. Two more attempts same day. Gillum stood up the rest of the work day fearing another assault and developed a long term involuntary reaction causing her to clutch the front of her clothing.	Sexual assault, fear, sexual control, psychological damage, emotional distress, interference with work duties.	Aplt. App. At 178 (Fact 159); 432-434,755,756.

43	5/12/93	Gillum told Penry about sexual assault. Penry more fearful of escalation of physical sexual conduct.	Fear, knowledge of sexual conduct toward other females, sexual control.	Aplt. App. At 178 (Fact 159); 432-434,755,756.
44	6/3/93 & 6/11/93	After female vice-president of Bank reported conduct to top management, derogatory statements placed in private files he kept on Gillum and Penry, combed through all of their collateral files looking for errors and accused Gillum of losing documents.	Abuse and retaliatory control of work environment, knowledge of abusive conduct toward other females, interference with work duties.	Aplt.App. At 178(Fact 161); 434-436, 755-757; 179(Fact 162); 433.
45	6/16/93	Management forced Penry to recount all of Waggoner's sexual conduct when she was close to the delivery of her baby.	Intimidation, abusive control, intentional infliction of emotional distress.	Aplt.App. At 180(Fact 166, 167); 440-443,757.
46	6/17/93	Angry management ousted	Intimidation, retaliation,	Aplt.App. At 181 (Fact

		Gillum from the bank premises before her two weeks notice of resignation expired.	public humiliation.	174); 445-447.
47	10/94	E-mail circulated by Bank to all employees in Kansas, Colorado, Oklahoma, Nebraska stating Penry was suing the Bank which would vigorously defend Waggoner.	Public humiliation, employees shunned Penry and labeled her a trouble maker.	Aplt.App. At 187 (Fact 200; 716-721.
	Undate	**Incidents Occurring Between 1990 and 1993**	**Environment Created**	**Cite to Record**
48		Screaming at Penry's female supervisor Betsworth in the hallway in front of Penry and other bank personnel.	Intimidation, public humiliation, demeaning.	Aplt.App. At 591.
49		While driving with Penry and Bailey, took hands off steering	Intimidation, control, incite fear.	Aplt.App. At 930.

		wheel while reclined driver's seat back.		
50		Alone with Penry in restaurant, described lewd conduct of persons sitting at table out of Penry's view and stated they might as well have been having sex.	Sexual control, public humiliation, demeaning, knowledge of abusive conduct toward other women.	Aplt.App. At 939.
	Date	**Incidents Occurring Multiple Times**	**Environment Created**	**Cite to Record**
51	1991-1993	Throughout 3 years was Gillum's supervisor, when handed her a paper, he repeatedly slowly and meaningfully rubbed his hairy arms against Gillum's arms or hand while his breathing changed so that he appeared sexaully stimulated by the contact. This action made	Sexual control, fear, intimidation, emotional distress, abusive conduct, fear of sexual advance.	Aplt.App. At 165 (Fact 99 & 104), 382,383, 468,469,470

		Gillum repeatedly sick to her stomach.		
52	Daily	Hateful stares at Gillum after reported sexual harassment.	Intimidation, control, retaliation.	Aplt.App. At 174 (Fact 140), 248.
53	1,992	Sneaking up behind Penry when she was pregnant, yelling at her in a loud voice while touching both of her shoulders a total of six to ten times.	Fear, control, intimidation, abusive, intentional infliction of emotional distress.	Aplt.App. At 161(Facts 78 & 79), 525,526, 531.
54	Until 10/92	Described female co-employee's affair with a married man during several of the collateral review trips.	Control over women, fear of sexual advance.	Aplt.App. At 589.
55	Until 10/92	Drank and drove when Penry, Gillum and Bailey were on out of town bank trips with him on several occasions.	Control over women, intimidation.	Aplt.App. At 228-229.

56	Daily	Called the females in the collateral department "gals" and not by name to customers.	Demeaning	Aplt.App. At 166(Fact 107)388,389.

No. 98-1191

In the

Supreme Court of the United States

October Term, 1998

MICHELE PENRY and DEBRA ANN GILLUM,

Petitioners,

-v-

FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE[1]

Petitioners filed this suit alleging hostile work environment and retaliation. Gillum also alleged constructive discharge. Neither alleged quid pro quo sexual harassment.[2]

Gillum and Penry were employed as collateral review assistants with FHLB beginning in 1989. Gillum resigned in 1993. Penry transferred to another department in 1994, and is still employed with FHLB. Initially, Waggoner, the collateral review manager, was not Petitioners' supervisor, except during out of town bank inspections. Petitioners were assigned by their supervisor to accompany Waggoner on out of town trips. In the Fall of 1992, Waggoner became Petitioners' supervisor. Aplee. App.\Penry 94 (110-111) (115), 97 (127-132), 110 (208), 119 (292-293), 145 (595-596), 157

[1] In the "Statement of the Case" section of the Petition, allegations of fact are made without citation to the record. Instead of setting forth all facts in the "Statement of the Case," reference is made in the Petition to a "Chart of Incidents" contained in the appendix to the Petition. The "Statement of the Case" section of the Petition, and the "Chart of Incidents" contain statements that are inaccurate, misleading or unsupported by the record. Respondents are compelled to correct Petitioners' misstatements of the record contained in the Statement of the Case pursuant to Rule 15.2 of the Supreme Court Rules, but cannot respond to all of the alleged facts contained in the chart while still complying with Rules 24 and 33(g)(ii) of the Supreme Court regarding format and page limitations. However, the facts were thoroughly addressed in Respondents' briefs filed in the Tenth Circuit Court of Appeals. The following numbered paragraphs in the Petition's Chart of Incidents contain statements that are either unsupported by the record, misleading or inaccurate: #2, 3, 5, 6, 7, 11, 14, 16, 17, 18, 20, 24, 26, 28, 29, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 49, and 51.

[2] All references to the parties will be abbreviated as follows: Michele Penry ("Petitioner" or "Penry"); Debra Ann Gillum ("Petitioner" or "Gillum") (collectively "Petitioners"); Federal Home Loan Bank of Topeka and its representatives ("Respondent" or "FHLB"); Charles R. Waggoner, in his capacity as defendants' representative and in his individual capacity ("Respondent" or Waggoner") (collectively "Respondents").

(22-24), 158 (25-26); Aplee. App. Gillum 38 (169), 102 (407), 134 (21), 93 (35).[3]

Petitioners present a long list of complaints regarding conduct and comments by Waggoner between 1989 and 1993, the vast majority of which was determined by both the district court and the Tenth Circuit Court of Appeals to be conduct that was not gender-based, such as pranks (e.g., Waggoner taking his hands off the steering wheel while driving, knocking on Penry's hotel door and then hiding, startling Penry).

The court of appeals found that Waggoner made four gender-based comments to Penry and that none of his conduct involving touching Penry constituted sexually offensive touching. The touching incidents involved pranks. Pet. App. 43a and 48a. The four alleged comments found to be gender-based were: (1) in March 1990, Waggoner asked Penry whether women have wet dreams; (2) in October 1990, Waggoner told Penry that her bra strap was showing, but that he kind of liked it; (3) in March 1991, Gillum overheard Waggoner in another cubicle remark to a co-worker that he could get into the drawers of another female worker, possibly referring to Penry, and Gillum told Penry about it; and (4) in the fall of 1992, before Waggoner became Penry's supervisor, he asked her what she was wearing under her dress. Pet. App. 6a-7a; 46a-47a.[4]

[3] "Aplee App. Gillum" refers to the appendix to the brief filed by Respondents in the Tenth Circuit Court of Appeals in Gillum's appeal; "Aplee. App. Penry" refers to the appendix to the brief filed by Respondents in the Tenth Circuit Court of Appeals in Penry's appeal; "Aplt. App. Gillum" refers to the appendix to the brief filed by Gillum in the Tenth Circuit Court of Appeals; "Aplt. App. Penry" refers to the appendix to the brief filed by Penry in the Tenth Circuit Court of Appeals. Where the cite is to a condensed deposition, the relevant deposition pages will be in parenthesis.

As to Gillum, the court of appeals found that Waggoner made one gender-based comment and engaged in four acts of unwanted physical contact, in addition to other touching that allegedly occurred periodically. Pet. App. 6a-7a; 25a-26a. The gender-based comment was in March 1991, when Gillum claims she overheard Waggoner make a comment about getting into an assistant's drawers. The four incidents of touching include the following: (1) in January 1991, when Gillum and Waggoner were working together she asked him a question about a document and when he came over to view it he leaned against her; (2) in December 1992, while looking over Gillum's shoulder at her work, Waggoner's body touched her, and she thought his breathing indicated sexual arousal; (3) in March 1993, Waggoner came into a file room and brushed against Gillum as he squeezed past her while she stood in front of an open file drawer; and (4) in May 1993, Waggoner squeezed himself between Gillum and her computer so that he was able to look down her shirt and she felt his pelvis touch her shoulder. She also claims that periodically, when she would hand him paper, he would touch her arms or hands with his arms, though she offered no evidence to show that the contact was anything other than inadvertent. Gillum acknowledges that Waggoner never asked for sex or even for a date. Aplt. App. Gillum 74 (239-40).

The Tenth Circuit agreed with the district court's analysis as to what conduct was gender-based, but disagreed slightly with it's approach in which all conduct that was not gender-based was considered to be irrelevant to Petitioners' claims. The Tenth Circuit held that the existence of sexual harassment must be determined "in light of the record as whole" and that an examination must be made of the totality of the circumstances, including "the context in which the

[4] "Pet. App." refers to the appendix filed with the Petition.

alleged incidents occurred." After a review of the record as a whole, the Tenth Circuit found that at least two of the incidents that the district court found were not gender-based were nevertheless relevant to the Petitioners' claims of hostile work environment. Those two incidents were: (1) Waggoner pointed out to Penry in the fall of 1991 and to Gillum in 1990, that the roof of a mall was shaped like a woman's breasts; and (2) Waggoner took Gillum to Hooters restaurant while on a business trip. Even though the Tenth Circuit found that these incidents were not "because of" Petitioners' gender, the acts had gender-related implications which could be considered when evaluating whether ambiguous conduct was in fact gender-motivated or whether gender-motivated conduct was so severe or pervasive as to create Title VII liability. After examining the evidence of gender-based conduct in light of the roof comment and the dinner at Hooters, the Tenth Circuit was unable to conclude that a rational jury could find that Petitioners were subjected to a hostile work environment. Pet. App. 7a-10a.

The Tenth Circuit found that the vast majority of conduct of which Petitioners complained was motivated by poor taste and a lack of professionalism rather than by Petitioners' gender, and that what made the Petitioners' environment hostile, if anything, was not gender-based incidents, but gender-neutral antics which could not be the basis of a Title VII action. The Tenth Circuit found that the gender-based incidents, which were spread over more than three years, were not so severe or pervasive to alter the conditions of the Petitioners' employment and create an abusive work environment. Pet. App. 10a

The statement in the petition that Petitioners' repeated complaints were not addressed by management until the

spring of 1993 and that management endorsed Waggoner's conduct by failing to act, is inaccurate. The earliest complaint to FHLB about Waggoner was in January 1992, by Penry, who requested anonymity. She was given literature on sexual harassment and advised to report any further offensive conduct. An immediate investigation was conducted to determine whether any other staff had similar complaints, but they did not. Aplee App.\Penry 31-32 (75-83), 34-35 (98, 108), 36 (110-113), 37 (119-120), 146 (599-600).

The next time a complaint was made to management about Waggoner was in February 1993. Aplee. App.\Penry 34 (97-98), 46-47 (41-45). Management immediately responded with an investigation, counseling of Waggoner and training seminars for management on sexual harassment. Aplee. App.\Penry 45 933-36), 46 (37-38, 40-42), 47 (43-45), 48 (54), 49 (58), 60 (237), 74 (149-51), 76 (197-99), 77 (212), 261.

After Petitioners again complained in April 1993, a thorough investigation was conducted. Aplee. App. Penry 52-53 (83-85), 172-80 (77-78, 80-95, 106-12), 184 (193), 185-87 (364, 375-77, 380-81), 189 (420-22), 257-63.

The statement in the petition that Waggoner's conduct escalated is inaccurate and not supported by citation to the record. As a part of management's response to Petitioners' complaints in April, 1993, a departmental meeting was called. Afterwards, Waggoner called Petitioners into his office and apologized for some of his prior statements and attempted to reassure them by telling them that he had worked with women for thirty years, he enjoyed their friendship and the only time he had fired women in the past had been for performance reasons. Petitioners doubted his sincerity and

interpreted his statement as a threat to retaliate against them by firing them if they again complained about him. They reported this to Waggoner's supervisor who assured them they could continue to bring their complaints to him and immediately admonished Waggoner, downgraded him on his evaluation and included this incident in a counseling statement issued to Waggoner. Aplee. App.\Penry 54 (93-94), 152-3 (679-80, 683-85), 167 (205-06), 178-79 (113-15), 180 (124-26), 181, 188 (407-09), 307-10, 392-93. No adverse employment actions were ever taken against Petitioners. Though it is claimed that Waggoner searched Petitioners' office files in retaliation for their complaints, there is no evidence in the record to support the allegation that the review of the records was for any purpose other than to carry out his job duties and this was not included in the Petitioners' pretrial questionnaire. Aplee. App.\Penry 383-91.

Petitioners state that much of Waggoner's behavior at the office was publicly humiliating. Petition, p. 11. Yet Petitioners make no citations to the record to support this statement, nor is it true. Petitioners also state that Waggoner made sexual comments when "he had control over the women alone and out of town." Petition, p. 11. Other than counsel's statements to this effect, there is no evidence in the record to support the statement that Waggoner had control over the women. Aplee. App.\Penry 97-98 (127-133). The statement in the petition that Waggoner knew that Gillum had been sexually abused as a child is inaccurate and not supported by the record. Aplee. App.\Gillum 131 (592-595). The statement that Penry was pregnant when much of Waggoner's touching and screaming occurred is misleading. The only incidents of "touching" involved pranks where Waggoner would startle Penry by touching her shoulders and saying her name when she didn't expect it. There is no evidence

that Waggoner's conduct was motivated by Penry's pregnancy.

FHLB had a policy against sexual harassment that was contained in the employee handbook and supervisors' manuals. Employees were encouraged to report sexual harassment and FHLB had a formal grievance procedure that allowed employees to bypass their supervisors and also provided that in sex discrimination cases the employees could forgo the formal grievance procedure and ask the human resources manager to handle the complaint directly. Aplee. App.\Penry 70-71 (80-81, 92-94), 114 (252), 320-322, 334.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THIS CASE DOES NOT INVOLVE A DECISION BY THE COURT OF APPEALS THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT BECAUSE THE COURT OF APPEALS PROPERLY CONSIDERED THE TOTALITY OF THE SURROUNDING CIRCUMSTANCES WHEN IT DETERMINED THE EXISTENCE OF SEXUAL HARASSMENT

One of the primary purposes of certiorari jurisdiction is to afford review where a court of appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. This purpose is expressed in Rule 10 of the Supreme Court Rules which provides in pertinent part as follows:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (c) a ...United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners assert that the decision of the Tenth Circuit Court of Appeals in this case is "directly contrary" to this Court's rulings regarding the proper analysis to apply to sexual harassment claims. Petitioners contend that while the court of appeals articulated the need to consider the "totality of the circumstances" when evaluating sexual harassment claims, it did not actually apply this in its analysis, but instead limited its consideration to conduct it considered to be gender-based and conduct with gender-related implications.

Contrary to Petitioners' assertions, the Tenth Circuit quoted and adhered to this Court's relevant decisions regarding the examination of the totality of the circumstance when determining the existence of sexual harassment. The court of appeals and Petitioners are in agreement as to the rule that a court should consider "the record as a whole" and the totality of circumstances, "including the context in which the alleged incidents occurred," in determining the existence of sexual harassment, but disagree as to its proper application to the facts of this case. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986) (quoting EEOC guidelines, 29 C.F.R.

§1604.11(b) (1985)). Petitioners interpret the rule as requiring the court of appeals to base liability on all conduct considered objectionable by Petitioners, regardless of whether the conduct was gender-based or had gender-related implications. The court of appeals did not agree. Instead, the court of appeals looked at all evidence of the Petitioners' general work environment and found that the vast majority of the conduct of which Petitioners complained amounted to gender-neutral antics motivated by poor taste and a lack of professionalism rather than gender, and so were irrelevant to a determination of whether there existed an actionable hostile work environment. But the court eschewed a mechanical approach in which all conduct that was not gender-based was deemed irrelevant, and instead, found that two incidents that were not gender-based were nevertheless relevant to Petitioners' claims of a hostile work environment because they had gender implications. The Court held that "[e]ven where the motive behind the alleged conduct was not the plaintiff's gender, the court may still consider that conduct relevant when evaluating whether ambiguous conduct was in fact gender-motivated or whether gender-motivated conduct was so severe and pervasive as to create Title VII liability." Pet. App. 10a.

This holding by the court of appeals in no way conflicts with the three decisions of this Court cited by Petitioners. Petitioners cite *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1003 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993); and *Meritor* as holding that in order to properly evaluate conduct claimed to constitute sexual harassment, a court must view the conduct in question in the context in which it occurred. As this Court noted in *Oncale*, a football player's environment is not severely or pervasively abusive where a coach smacks him on the buttocks as he

leaves the field, though the same conduct would be if directed at the coach's secretary back at the office. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. at 1003. There is nothing in the Tenth Circuit decision that suggests any deviation from this principle. The Tenth Circuit cited several cases, including *Meritor*, as requiring a trier of fact to examine the totality of the circumstances, including the context in which the alleged incidents occurred, in determining the existence of sexual harassment. Pet. App. 7a-8a.

The real dispute in this case is not whether a trier of fact must consider the totality of circumstances in determining whether conduct constitutes sexual harassment, but how the rule should have been applied to the facts of this case. Petitioners contend, in essence, that the context in which much of Waggoner's conduct occurred should have convinced the court of appeals that the conduct was motivated by discriminatory intent. The Tenth Circuit simply did not agree and instead found that the vast majority of the conduct in question was motivated by poor taste and a lack of professionalism rather than Petitioners' gender. In so holding, the court of appeals cited an earlier decision in which they held: "If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment." Pet. App. 11a.

Rule 10 of this Court's Rules provides as follows:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Certiorari review should be denied in this case because the essence of Petitioners' claim of error is that the court of appeals properly stated the rule of law, but misapplied it to the facts.

II.

THE RULING BY THE COURT OF APPEALS DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT REGARDING THE SUFFICIENCY OF ABUSIVE CONDUCT TO ESTABLISH A SEXUAL HARASSMENT CLAIM

Petitioners' second argument is that the decision below conflicts with this Court's precedent in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Oncale* because it imposes different "guidelines" for determining the sufficiency of abusive conduct in establishing a sexual harassment claim.

Petitioners fail to identify the asserted conflict between the guidelines followed by the court of appeals in the decision below and this Court's guidelines for determining the existence of sexual harassment in *Faragher* and *Oncale* and no such conflict exists. The guidelines applied by the court of appeals below were the guidelines established by this Court.

The Tenth Circuit held that a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The court further held that a

plaintiff must produce evidence that she was the object of harassment because of her gender and that conduct that is overtly sexual may be presumed to be because of the victim's gender, though actionable conduct is not limited to behavior motivated by sexual desire. In addition, the court of appeals held that while the plaintiff must make a showing that the environment was both objectively and subjectively hostile, she need not demonstrate psychological harm, nor is she required to show that her work suffered as a result of the harassment. Pet. App. 5a-6a. Thus, the guidelines articulated by the court of appeals were simply a restatement of the precedents established by this Court, primarily in *Harris*, *Meritor* and *Oncale*.

Petitioners also contend that the facts of this case are far more egregious than those in *Faragher* and *Oncale*, so that to allow the opinion to stand would be to establish a threshold of proof far more onerous than was established in those cases. First, the abusive, gender-based conduct in *Faragher* and *Oncale* was far more severe and pervasive than those asserted by Petitioners. While *Faragher* involved repeated overt sexual touching and groping of female employees' bodies, requests for sexual favors and a vulgar pantomime of oral sex, and *Oncale*, involved several occasions when Oncale was forcibly subjected to sex-related, humiliating acts in the presence of others and physically assaulted and threatened with rape, nothing remotely approaching such conduct was established by Petitioners. Second, because the decision of the court of appeals below did not contravene any guidelines or standards of actionable conduct established by this Court, the petition for a writ of certiorari should be denied. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and is "rarely granted" when the claimed error is the "misapplication of a properly stated rule of law."

Accordingly, Petitioners have failed to demonstrate that the court of appeals has decided this case on an important federal question in a way that conflicts with relevant decisions of this Court. As a result, the petition should be denied.

III.

THIS COURT SHOULD NOT GRANT REVIEW OF PETITIONERS' CLAIM THAT FHLB CREATED A HOSTILE WORK ENVIRONMENT THROUGH THREATS AND INACTION BECAUSE THE COURT OF APPEALS DID NOT DECIDE THE ISSUE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

Petitioners' third argument is that FHLB created a hostile work environment through the threats and failures of its officers to act following Petitioners' complaints of sexual harassment by Waggoner. This argument is essentially the same as the Petitioners' first and second arguments. Petitioners do not identify a rule of law that was incorrectly decided by the court of appeals in the decision below, nor do they assert or identify how the decision conflicts with relevant decisions of this Court or any other court of appeals. Instead, Petitioners simply re-argue facts and conclude that the court of appeals misapplied a properly stated rule of law to the facts. The Tenth Circuit properly stated the law in holding that to survive summary judgment, a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the terms and conditions of the victim's employment and create an abusive working environment. Pet. App. 5a-6a; *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21.

Under Rule 10 of the Supreme Court Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Consequently, the Court should deny the petition.

IV.

THE COURT SHOULD NOT GRANT REVIEW OF THE DECISION OF THE COURT OF APPEALS REGARDING RETALIATION BECAUSE THE ASSERTED ERROR CONSISTS OF ERRONEOUS FACTUAL FINDINGS OR THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW

Petitioners' fourth argument is that a writ of certiorari should be granted because in ruling on the retaliation claim the court of appeals misapplied an otherwise properly stated rule requiring adverse employment action to the facts of this case. Yet Rule 10 of the Supreme Court Rules states that certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The court of appeals below held that to establish a prima facie case of retaliation under Title VII, the plaintiff must show the court that:

> (1) she engaged in protected opposition to Title VII discrimination ....; (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a

> causal connection between the protected activity and the adverse employment action.

Pet. App. 11a. After a thorough review of the record, the court of appeals agreed with the district court's conclusion that a prima facie case of retaliation had not been made because "the record fails to demonstrate that either of the plaintiffs suffered adverse employment action ...." App. 11a.

None of the cases cited by Petitioners conflict with the rule articulated by the court of appeals requiring adverse employment action to establish a prima facie case of retaliation. Nor do any of the cases cited by Petitioners reach a contrary result under similar factual circumstances. Petitioners claim that Respondents should have been held liable for retaliation because the Petitioners perceived a job threat from Waggoner after reporting their complaints, even though there is no evidence that Waggoner had authority to fire employees. Waggoner's superior immediately assured Petitioners that no retaliation would occur and encouraged them to report to him all complaints they had in the future, warned Waggoner not to retaliate, and no adverse action of any kind was ever taken against Petitioners.

Petitioners cite *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), but that case involved the question of whether the anti-retaliation provisions of Title VII apply to former employees, and does not address the question of whether a perceived threat by a supervisor is actionable regardless of whether the perceived threat is immediately countermanded by the supervisor's superior and no adverse employment action is taken.

Petitioners also cite *Hashimoto v. Dalton*, 118 F.3d 671, 675 (9th Cir. 1997), but that case is distinguishable. In *Hashimoto*, the employer was found to have engaged in adverse employment action against a former employee who had filed an EEOC complaint when the employer disseminated a negative job reference to a prospective employer in retaliation for filing a complaint. Here, on the other hand, no adverse employment action was taken.

The third case cited by Petitioners is *EEOC v. L.B. Foster Co.*, 123 F.3d 746 (3rd Cir. 1997). This case also fails to support Petitioners' contention because in *L.B. Foster Co.*, the court of appeals held that the plaintiff had made out a prima facie case of retaliation because she had shown that following her threat to file a complaint, her former employer had taken adverse employment action against her by refusing to give her a job reference when such references were routinely given. No such adverse employment action exists here.

Petitioners also contend that the decision of the court of appeals below conflicts with three of its previous decisions. In the first case, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, (10th Cir. 1996), the employer engaged in actual retaliatory action by filing criminal charges against a former complaining employee. In the second case, *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), the employer retaliated with an unflattering job reference. In *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984), the court of appeals recognized termination as adverse employment action. These three cases differ from the decision below where no adverse employment action was taken against the Petitioners at any time. Moreover, under Rule 10 of the Supreme Court, conflicting decisions from the same

court of appeals is not one of the circumstances for which certiorari is generally granted.

V.

REVIEW SHOULD NOT BE GRANTED AS TO CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL HARM BECAUSE THE COURT OF APPEALS DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY A STATE COURT OF LAST RESORT

Petitioners' fifth argument in support of their petition is that the court of appeals did not correctly apply to the facts the legal standard established by the Kansas Supreme Court regarding intentional infliction of emotional harm. However, this is not generally the circumstances under which this Court grants a petition for a writ of certiorari. In describing the character of the reasons this Court considers in granting review on a writ of certiorari, Rule 10 of this Court's rules, further provides in pertinent part :

> (a) a United States court of appeals ... has decided an important federal question in a way that conflicts with a decision by a state court of last resort..."

Petitioners fail to assert the existence of an important federal question presented by the ruling on the claim of intentional infliction of emotional harm, and none exits. A common law question of intentional infliction of emotional harm does not involve an important federal claim.

Moreover, the court of appeals in the decision below quoted and relied upon the legal standards for such claims established by the Kansas Supreme Court in *Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95, 864 P.2d 744, 749 (Kan. 1993) and *Moore v. State Bank*, 240 Kan. 382, 729 P.2d 1205, 1211 (Kan. 1986), and Petitioners do not assert to the contrary. Pet. App. 12a - 13a. Therefore, the Court should deny the petition regarding this asserted error.

VI.

IN GRANTING RESPONDENTS' BILL OF COSTS, THE TENTH CIRCUIT DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT OR WITH DECISIONS OF ANOTHER COURT OF APPEALS

Petitioners' last argument is that the petition should be granted to permit review of the decision granting Respondents' bill of costs awarded pursuant to Fed. R. App. P. 39.

Petitioners cite no relevant, conflicting decisions of this Court or of another court of appeals. Instead, Petitioners cite *Tukadinovisch v. McCarthy*, 59 F. 3d 58 (C.A. 7, Ind. 1995), which is a case permitting a defendant to be reimbursed for attorney fees incurred in seeking to collect an award of costs and attorney fees under 42 U.S.C. §1988, as opposed to Fed. R. App. P. 39, which was the basis for the decision of the court of appeals below. Unlike an award of costs and fees under 42 U.S.C. §1988, where awards to prevailing defendants are generally limited to frivolous claims or appeals, (*Id.* at 61.), under Fed. R. App. P. 39 costs are routinely awarded to an appellee where the judgment is affirmed.

Fed. R. App. P. 39(a)(2) provides that "unless the law provides or the court orders otherwise ... if a judgment is affirmed, costs are taxed against the appellant." Here, judgment was affirmed on appeal. Accordingly, the court of appeals did not decide an important federal question in a way that conflicts with relevant decisions of this Court or with a decision of another United States court of appeals, and as a result, the petition should be denied.

Moreover, Petitioners did not prevail on any claim they asserted and were not awarded any relief. The court of appeals affirmed the district court's entry of summary judgment on all claims.

CONCLUSION

Petitioners have failed to demonstrate that the court of appeals has entered a decision in conflict with the decision of another U. S. court of appeals, in conflict with relevant decisions of this Court or in conflict with a decision of the Kansas Supreme Court on an important federal question. Nor have they established any compelling reason for granting the petition for a writ of certiorari. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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